THE U.S. SUPREME COURT DECISION CONCERNING THE LEGISLATIVE VETO

DEPOSITORY

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THE U.S. SUPREME COURT DECISION REGARDING THE LEGISLATIVE VETO

TUESDAY, JULY 19, 1983

HOUSE OF REPRESENTATIVES,
COMMITTEE ON FOREIGN AFFAIRS,
Washington, D.C.

The committee met at 10:20 a.m., in room 2172, Rayburn House Office Building, Hon. Clement J. Zablocki (chairman) presiding.

Chairman ZABLOCKI. The committee will please come to order.

We meet this morning to begin hearings on an issue of great significance: the Supreme Court decision of June 23, 1983, involving the deportation case of *Chadha* v. *Immigration and Naturalization Service.*

That specific case centers on the constitutionality of the one-House veto and the constitutional requirement of presentment of legislation to the President for his consideration. The Supreme Court concluded that such a mechanism violates the Constitution's separation of powers principle.

Another aspect of the case involved the issue of severability; that is, whether an entire statute with a legislative veto provision could be invalidated, although it contains a severability clause isolating the veto provision from the whole, as is the case with the War Powers Act

Broadly interpreted, the Supreme Court's 7-to-2 decision appears to strike down the validity of all legislative veto provisions in some 200 laws on the statute books.

In the dissenting opinion by Justice White, he termed as "regrettable" the sweep of the Court's decision on the legislative veto Justice White noted, and I quote, "The history of the legislative veto makes clear that it has not been a sword with which Congress has struck out to aggrandize itself at the expense of the other branches—the concerns of Madison and Hamilton. Rather, the veto has been a means of defense, a reservation of ultimate authority necessary if Congress is to fulfill its designated role under article I as the Nation's lawmaker." The Justice further described the mechanism as "a necessary check on the unavoidably expanding power of the agencies."

The Supreme Court decision has far-reaching ramifications for statutes within the purview of the Committee on Foreign Affairs: war powers, foreign aid, arms sales and leases, exports, and transfers of nuclear-related materials, to name a few.

Of direct concern to the committee are 16 provisions of law within its jurisdiction, the single most important of which is the

war powers resolution. A list of the provisions that we are concerned about is before each member.

In addition to legislative veto provisions in current law, there are also similar provisions in this year's foreign aid bill, H.R. 2992, involving the El Salvador compromise. At each member's desk is a summary of the legislative veto provisions in the bill regarding El Salvador.

Last week the Rules Committee denied a rule on that legislation, H.R. 2992, because it contained legislative veto provisions. That fact obviously underscores the importance of these hearings and the need to come to a solution to the problem. A solution must be found rather quickly.

The purpose of these hearings is to help clarify the precise meaning and implication of the Supreme Court decision. On the basis of that understanding, our hope is to find acceptable alternative solutions for both existing laws and the El Salvador compromise language in H.R. 2992.

The challenge for all of us is how best to address and deal with the new situation we face in a practical and harmonious fashion. It is important that we preserve the system of checks and balances, as well as the spirit of comity and cooperation, through prudent and judicious accommodation.

Our witness today, Mr. Stanley Brand, legal counsel to the House of Representatives, will assess the scope and impact of the Supreme Court's decision on existing statutes and address the challenges facing the Congress and possible alternatives available.

Tomorrow we will hear from the administration, the Departments of Justice and State, on how they plan to proceed in order to maintain a cooperative relationship with Congress on foreign policy matters.

Thursday we will receive testimony from two eminent legal scholars who will provide their assessments and interpretations of the Court's decision.

Mr. Brand, although you fought an unsuccessful fight, you did very well. We welcome you. It is a pleasure to have you here with us this morning. We look forward to your testimony. You may read your prepared statement, if you wish, or, if you prefer, summarize it. The full text will be included in the hearing record. If you will proceed, Mr. Brand.

STATEMENT OF STANLEY M. BRAND, GENERAL COUNSEL TO THE CLERK, HOUSE OF REPRESENTATIVES

Mr. BRAND. Thank you, Mr. Chairman.

Maybe in my home court I can get the votes to win with this committee.

Mr. Chairman and members of the committee, I first want to express my appreciation for being asked to testify before this most august and prestigious committee with its well-deserved reputation for statesmanship and expertise in shaping the foreign policy of this Nation.

It is humbling for any lawyer, and particularly for me as the House's lawyer, to appear before you, as I look up and see the chairman, who was, by all accounts I have read, the true architect

of and moving force behind one of the landmark measures reported from this committee, the war powers resolution. I hope the chairman will invite me back after what I have to say today.

Chairman ZABLOCKI. Have no fear.

Mr. BRAND. As the House's litigating attorneys, involved as we are in dozens of cases concerning the constitutional and legal powers of the House, I am rarely at a loss for words or legal theories on which to base advocacy of the House's prerogatives.

Yet, as I approach the task of reviewing the Supreme Court's legislative veto ruling and its impact on hundreds of laws passed by Congress and signed by the President, I was struck with a rare ambivalence about how to advise this committee and others.

I, along with Prof. Gene Gressman, was counsel for the House of Representatives in *INS* v. *Chadha* and in two other cases recently handed down on the legislative veto.

After my initial reaction to the decision as a monumental one which would alter basic relationships among the branches perhaps for decades, I determined to reevaluate the decision in more detached isolation to provide this committee with advice untainted by the inescapable passions of one who briefed and argued and lost—by a stunning consensus by this Court's standards, I might say—the legislative veto cases.

Nevertheless, I have, after this process, returned to the point where I began. The *Chada* decision is a broad and sweeping pronouncement by the Court which, fairly read, places the concurrent resolution veto provisions in statutes like the Nuclear Nonproliferation Act, the International Security Assistance and Arms Control Act of 1976, and the War Powers Resolution in dire jeopardy, if not in extremis, along with many other legislative review mechanisms.

For a subject that has been vigorously debated for over 50 years in law journals, opinions of the Attorney General, in committees and by political scientists, all of which produced an archive of material on the subject, the decision is uncharacteristically economical and direct on the key issue of constitutionality.

Dispensing with threshold jurisprudential questions of standing, adverseness and justiciability, those bedrock article III case or controversy prerequisites to which the Court generally pays the most pietistic homage, the Court reached the merits and in sweeping language razed the legislative veto with a dispatch rarely seen in less important cases.

No struggling or agonizing for the Court; no application of the now axiomatic rules of constitutional adjudication that statutes are to be construed to avoid constitutional doubt, that limiting constructions which preserve the validity of a statute are to be imposed before a statute is voided, "that we ought not to pass on questions of constitutionality * * * unless such adjudication is unavoidable," or that "constitutional adjudication is the most important and delicate of a Court's responsibilities," particularly in parsing fundamental coordinate branch powers. Instead, the decision reflects narrow judicial didacticism and a literalistic view of the Constitution

The skindeep analysis of the holding of the Court is at once simple and simplistic. In striking down that part of the Immigra-

tion and Nationality Act permitting Congress to review and deny suspensions of deportation, the Court defined legislative action as that which has "the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, executive branch officials and *Chadha,*" the respondent in that case, "all outside the legislative branch."

Finding the action of the House in reviewing the Attorney General's suspension to be legislative in purpose and effect, the Court went on to hold that all actions which are legislative in purpose and effect must be passed by both Houses and presented to the President under the so-called presentment clause.

The Court set forth a civics-like test in adjudicating the vast constitutional powers of the Congress and ordained that determinations of policy "can be implemented in only one way: bicameral passage followed by presentment to the President."

On the key issue of severability, a lawyer's word that has now suddenly crept into the everyday parlance of Washington's lay and news analysts, legislative assistants and bureaucrats, the Court surgically removed only that small offending part of the statute, leaving intact and operative the remaining large-scale delegation of authority to the executive branch. Severing the statutes in this way, the Court only invalidated the congressional quid and preserved the executive quo.

The scope of the ruling is, in my view, as broad and as sweeping as the dissenting Justice noted in his separate opinion, conjecturing that the decision "also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a legislative veto."

Of course, technically the statutes which remain on the books are still valid because they were not before the Court for decision. However, the holding of the case applied to other statutory contexts would surely produce the same result, leaving aside for the moment the severability issue, which the chairman addressed in his opening statement.

This point was brought home by the summary affirmances issued by the Court following *Chadha* in *Consumers Energy Council* v. *FERC,* involving respectively a one-House and two-House review of exercises of regulatory authority.

The former statute did not contain a severability clause and the court of appeals blithely stated that the presence or absence of the clause was mostly irrelevant, the key question being instead "whether Congress would have enacted the remainder of the statute without the unconstitutional provision."

The cavalier treatment of the severability issue gives one pause to reflect on the likelihood of retrieving under the severability holding any part of what was lost on the constitutional merits.

The question comes on the impact of *Chadha* on the statutes not before the Court, including those emanating from this committee. We in the Congress delude ourselves to the extent that we ignore the clear storm warnings of the *Chadha* ruling and insist, like those who after the discovery of America continued to believe the Earth was flat, that legislative vetoes are still valid.

There are some statutory mechanisms which, because they partake of peculiar report and wait provisions or fall in other minor

fissures in the otherwise seamless fabric of the decision, will survive.

By and large, it is erroneous and foolhardy to continue to assert the validity of these mechanisms in the aftermath of *Chadha.* The severability of the legislative veto from the rest of the statute is now the only remaining issue to be decided.

Generally, the invalid or offending part of a statute is stricken only unless it is evident that the legislature would not have enacted the rest of the statute without the unconstitutional provision.

Where Congress includes what is known as a severability clause, providing that the remainder of the act shall not be affected by invalidity of a part, there is a presumption that the remainder of the act is valid.

As with all legal presumptions, it may be overcome by examination of congressional intent which demonstrates clearly the opposite; namely, that Congress would not have enacted "* * * the remainder of the Act * * * if any particular provision were held invalid."

As the chairman mentioned, the war powers resolution, for example, contains a separability provision. A review of the legislative history reveals that the concurrent resolution veto provision was viewed as a necessary and integral alternative to the provision which preceded it—the automatic termination provision—in order to control the President's commitment of troops. It provides for the termination of the President's action covered in the report through passage of a concurrent resolution by both Houses.

Reviewing the legislative history in *Chadha,* the Court concluded that "it is not sufficient to rebut the presumption of severability * * * because there is insufficient evidence that Congress would have continued to subject itself to the onerous burdens of private bills had it known that section 244(c)(2)," the provision with the veto, "would be held unconstitutional."

Further, because the remaining part after severance remains fully operative as a law, and could be administered without the severed part, the Court concluded a workable administrative mechanism (existed) without the one-House veto.

As previously indicated, it is doubtful how far the Courts will actually need to go to find the evidence of severability identified in *Chadha.* In very few instances does the legislative history reveal the kind of pervasive and abiding concern with delegating any power at all to the executive without making it entirely dependent on a legislative reservation. Mere reluctance to delegate final authority is not enough.

While we in Congress may feel in our hearts that much of this authority would not have been delegated without a reservation, I believe the Courts will find severability in many cases absent an overwhelming record that establishes that fact.

Nor do I believe that Congress has an option, as some have suggested, to amend statutes to add or remove a separability provision at this time. Such post hoc attempts to engraft inseparability provisions on laws passed by prior Congresses would be doomed to fail in light of the element of contemporanity of congressional intent which undergirds the Court's separability analysis.

In summarily affirming the *FERC* decision, which did not contain a severability clause, the Court sowed further seeds of doubt about how thoroughly it will examine the issue in any later cases.

What the Court did not explain is how it severed not section 244 as a whole, providing an integrated three-step procedure for granting cancellation of deportation orders, but only the second step of legislative review, and not the first and third steps of suspending and cancelling deportation contained within the same section.

In short, the section invalidated contained the very authority which permitted the Attorney General to cancel deportation. This amounts to nothing less than judicial legislating; in effect, recasting a procedural scheme to grant unreviewable finality to orders of the INS and Attorney General.

This feat of judicial redraftsmanship is indeed cause for alarm. Under the judicial rubric of severability, it will permit Courts to rewrite statutes carefully crafted after legislative compromise, but with Pavlovian regularity inserted severability clauses like legal boilerplate in contracts. The Congress will be left with nothing or very little, while a wholesale delegation will remain intact.

If the Court's separability rulings presage judicial decisions on this question, Congress has significantly fewer options to redress the balance of power shifted by *Chadha* to the executive.

Taking the war powers resolution only as an example—and because I know it slightly better than the others—assuming arguendo it is severable, Congress is faced with the very erosion of power sought to be restored by the resolution, for the President may either commit troops with impunity, resting on a legal position that the concurrent resolution veto is inoperative, or having reported the commitment as required by the reporting sections ignore with equal impunity the war powers resolution's requirements to recall those troops after 60 days, if Congress attempts to enforce the automatic termination provision or to exercise the concurrent resolution veto provided by section 5(c).

Similarly, under the International Security Assistance and Arms Control Act of 1976, the President's letter of offer to sell major defense equipment may be disapproved by concurrent resolution. After *Chadha,* there is no reason to believe this provision is constitutional and the President is free to ignore the restraints.

Because *Chadha* opens up the floodgates to private litigants by according standing to those who challenge statutes on the ground that Congress has violated the executive's rights, even tacit acquiescence by the executive to such statutory arrangements, if indeed that is even probable after this decision, cannot save the statutes from attack by aggrieved plaintiffs.

Perhaps a President might determine to formally abide by a concurrent resolution disapproving a proposed sale of defense articles or to informally abide by reading the congressional winds as counseling hesitation.

But that is not the end of it because a contractor who stands to lose, let us say, a $40 million defense contract by the unconstitutional accommodation between the branches may sue, like every red-blooded American would, to contest the legislative review provision.

This disappointed defense contractor has standing. In a little reported sentence in *Chadha,* the Court has worked one final mutation of our jurisprudence. It falls to the House and Senate to litigate the case if the executive, as it has done in all these cases, confesses unconstitutionality, for "we have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional."

It therefore falls to congressional counsel in this brave new legal world established by *Chadha* to sally forth and meet the aggrieved adversary parties in the district and appellate courts. Ironically, by doing so, the Congress transforms a "friendly nonadversary proceeding," otherwise nonjusticiable, into a live suit the courts can decide.

In one last Kafkaesque twist, the Congress thereby supplies adverseness and insures a ruling against its statute which, but for its presence as a participant, the colluding friendly parties could not obtain. In these instances, the only real issue will be the severability of the legislative veto from the remainder of the statute.

In my view, private plaintiffs will have a heavy burden to demonstrate inseverability. This time around, I would bet that rather than cast their lot with aggrieved plaintiffs attacking the statutes, now having won the key constitutional issues, the executive will be arguing to save the remainder of the provisions enacted with the veto to preserve the lion's share of their delegated authority.

This, then, is the sum and substance of *Chadha* and its impact on the congressional landscape. Under these circumstances, it is my view that Congress is better served by wholesale repeal of the delegations effected by these statutes and a return to what lawyers call the status quo ante or, in everyday parlance, "the way we were" before *Chadha.*

On this note I would respond, as I have throughout, to some of the many provocative and thoughtful questions propounded by Mr. Ray Celada of the Congressional Research Service. I do not believe we can take any solace in the difficulty which would normally confront a litigant trying to get these statutes into court.

On the basis of the court's complete indifference to the article III standing and "case or controversy" analysis, among others, I believe countless cases may well be brought, and no time was lost in doing so on the heels of the decision.

In fact, on July 1, 1983 the American Federation of Government Employees brought suit to recover probably billions in comparability pay raises which they claim are due to Federal workers under a provision which provides legislative review.

Herein lies yet another potential for wholesale transfer of power and responsibility from the Congress to another, less responsive branch—the courts—in addition to that already shifted from Congress to the executive

In fact, in *Crockett* v. *Reagan* a district court has decided that although the fact-finding necessary to determine whether U.S. troops have been introduced into hostilities renders a suit against the executive for violation of the war powers resolution nonjusticiable, "it leaves open the possibility for a court to order that a report be filed

or, alternatively, withdrawal 60 days after a report was filed or required to be filed by a court or Congress."

Again, because I am in my home court, I can say perhaps more horrifying than the proposition that the President alone can decide under what circumstances to commit our troops is the specter that life-tenured Federal judges could somehow, under the umbrella of the war powers resolution, interject themselves into the sensitive decisionmaking process with respect to warmaking.

. The Congress is now faced with a fundamental decision: how to restore the balance rendered askew by the *Chadha* decision. In making a decision, the Congress should remember, even if the courts do not, that we are talking about great and vast powers, what has been called a virtual armamentarium, vested in the elected representatives for a purpose: to attain and retain accountability.

Read the Constitution and compare the powers conferred on the Congress and those conferred on the executive. Is there any genuine dispute that it is Congress which has arrayed on the article I side of the ledger the most explicit and direct say over the political and policy lifeblood of the Nation?

Justice White's separate opinion explains for me why the alternatives to the veto are, in one way or another, unsatisfactory. To be sure, oversight of executive branch decisionmaking is available, but we have recent experience with several executives who have asserted that congressional oversight of the executive branch administration of laws constitutes interference in the decisionmaking process delegated to the executives and that Congress interest in oversight is "considerably weaker" than its interest in specific legislative proposals. These methods of correcting agency abuse or misdirection are imperfect at best.

During consideration of the Consumer Product Safety Commission authorization in the wake of the decision, amendments were adopted which would require the positive approval of both Houses and the President before any safety standard could go into effect.

This committee must gage whether the solution to the dilemma posed by *Chadha* achieved in that instance is feasible in the areas over which you are vested with jurisdiction, involving as they do sensitive relations with sovereign nations and, on occasion, considerations of time and rapidly changing international situations.

My own view is, as an advocate for the House of Representatives, that we "wipe the slate clean" and repeal all delegations which were enacted under the now erroneous assumptions made before *Chadha.*

Justice White has framed the dilemma Congress must now confront in stark terms: "Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with the hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, abdicate its lawmaking function to the executive branch and independent agencies."

For me the choice is clear. I can conceive of no supportable argument that we should abdicate legislative responsibility. It was, after all, an emboldened executive which attacked these statutes as

unconstitutional on every front to provide a "vital check against tyranny."

It was the executive, in its arguments to the courts, which elevated the requirements of article I, section 7, to inescapable procedural restrictions on the Congress on the ground that "although the Constitution is certainly flexible, it cannot be stretched so far as to permit a plainly invalid procedure simply because Congress does not wish to use the power it already has."

Having succeeded in convincing the court that striking down the veto was necessary despite its utility because "the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power—not to avoid friction, but by means of inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy," let the executive now utilize the procedures it argued were essential and unbending to preclude legislative tyranny to obtain needed authority on a case-by-case basis.

The executive cannot now be heard to complain that subjecting its authority to bicameral review and presentment threatens the workability of our Government. Congress should shift the burden to the executive to convince the Congress on a case-by-case basis that it needs unreviewable authority.

In the ultimate analysis, the remedy devised by this committee should be premised not on the lawyer's advice or legal scholarship, however erudite. It was, after all, the legal theorists writing in journals who supplied much of the impetus for destruction of the legislative veto. It should rest instead on the firm conviction that this dispute between the political departments of government over who should make decisions must be resolved in favor of those who are vested with the constitutional responsibility of governing in all these areas.

Thank you, Mr. Chairman.

[Mr. Brand's prepared statement follows:]

PREPARED STATEMENT OF STANLEY M BRAND, GENERAL COUNSEL TO THE CLERK, HOUSE OF REPRESENTATIVES

Mr. Chairman and Members of the Committee. I first want to express my appreciation for being asked to testify before this most august and prestigious committee with its well deserved reputation for statesmanship and expertise in shaping the foreign policy of this nation. It is humbling for any lawyer, and particularly for me as the House's lawyer to appear before you, as I look up and see the Chairman, who was, by all the accounts I have read, the true architect of and moving force behind one of the landmark measures reported from this Committee: The War Powers Resolution. I hope the Chairman will invite me back after what I have to say today.

As the House's litigating attorneys, involved as we are in dozens of cases concerning the constitutional and legal powers of the House, I am rarely at a loss for words, or legal theories on which to base advocacy of the House's prerogatives. And yet as I approached the task of reviewing the Supreme Court's legislative veto ruling and its impact on hundreds of laws passed by Congress and signed by the President, I was struck with a rare ambivalence about how to advise this Committee and others. I, along with Professor

Gene Gressman, was counsel for the House of Representatives in INS v. Chadha, 51 U.S.L.W. 4907 (U.S., June 23, 1983), and in the two (2) other cases recently handed down on the legislative veto. Consumers Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir. 1981) aff'd 51 U.S.L.W. 3935 (U.S. July 6, 1983) Consumers Union of the United States v. FTC, 691 F.2d 575 (D.C. Cir. 1982) (en banc) aff'd, 51 U.S.L.W. 3935 (U.S., July 6, 1983). After my initial reaction to the decision as a monumental one which would alter basic relationships among the branches perhaps for decades, I determined to re-evaluate the decision in more detached isolation to provide this Committee with advice untainted by the inescapable passions of one who briefed and argued and lost, by a stunning concensus by this Court's standards I might say, the legislative veto cases.

Nevertheless, I have, after this process, returned to the point where I began: the Chadha decision is a broad and sweeping pronouncement by the Court which fairly read places the concurrent resolution veto provisions in statutes like the Nuclear Non-Proliferation Act, Pub.L.No. 95-242, §§304-307, 401, 92 Stat. 120, 130, 134, 137-38, 139, 144, 42 U.S.C. §§2160(2), 2155(b) 2157(b), 2153(d), the International Security Assistance and Arms Control Act of 1976, Pub.L.No. 94-329, §211, 90 Stat. 729, 743, 22 U.S.C. §2276(b) and the War Powers Resolution, Pub.L.No. 43-198, §5, 87 Stat. 556, 556-557, 50 U.S.C. §1544 in dire jeopardy, if not in extremis, along with many other legislative review mechanisms.

For a subject that has been vigorously debated for over 50 years in law journals, opinions of the Attorney General, in committees, and by political scientists, all of which produced an archive of material on the subject, the decision is uncharacteristically economical and direct on the key issue of constitutionality.

Dispensing with threshold jurisprudential questions of standing, adverseness and justiciability, those bedrock Article III "case or controversy" prerequisites to which the Court generally pays the most pietistic homage, the Court reached the merits and in sweeping language razed the legislative veto with a dispatch rarely seen in less important cases. No struggling or agonizing for the Court; no application of the now axiomatic rules of constitutional adjudication that statutes are to be construed to avoid constitutional doubt, Crowell v. Benson, 285 U.S. 22, 62 (1932) and a constitutionally disabling interpretation avoided, Lynch v. Overholser, 369, U.S. 765, 711 (1962) that limiting constructions which preserve the validity of a statute are to be imposed before a statute is voided in whole or part, United States v. Harriss, 347 U.S. 612, 618 (1954); "that we ought not to pass on questions of constitutionality. . .unless such adjudication is unavoidable[]", Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101, 105 (1944); or that "constitutional adjudication [is] the most important and delicate of [a court's] responsibilities," Schlesinger v. Reservists To

Stop The War, 418 U.S. 208, 221 (1974), particularly in parsing fundamental coordinate branch powers; instead, the decision reflects narrow judicial didacticism and a literalistic view of the Constitution.

The "skin deep" analysis of the holding of the Court is at once simple-and-simplistic. In striking down that part of the Immigration and Nationality Act, 8 U.S.C. §1254(c)(2), permitting Congress to review and deny suspensions of deportation, the Court defined legislative action as that which has "the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive branch officials and Chadha, all outside the legislative branch." INS v. Chadha, 51 U.S.L.W. at 4916. Finding the action of the House in reviewing the Attorney General's suspension to be legislative in "purpose and effect" the Court went on to hold that all actions which are legislative in "purpose and effect" must be passed by both Houses and presented to the President under the so-called Presentment Clause, art. I, §7. The Court found additional support for its reasoning in specific provisions "by which one House may act alone, with the unreviewable force of law, not subject to the President's veto." Id., 51 U.S.L.W. at 4917. The Court set forth a civics like test in adjudicating the vast constitutional powers of the Congress and ordained that determinations of policy "can [be]

implement[ed] in only one way: bicameral passage followed by presentment to the President." Id. 1/ This, then, is the oracular holding of Chadha.

On the key issue of severability, a lawyer's word that has now suddenly crept into the everyday parlance of Washington's lay and news analysts, legislative assistants and bureaucrats, the Court surgically removed only that small offending part of the statute, leaving in tact and operative the remaining large scale delegation of authority to executive and independent agencies. Severing the statutes in this way, the Court only invalidated the congressional quid and preserved the executive quo. This ruling, as we will shortly see, has significant consequences for the statutes emanating from this committee, among them the International Security Assistance and Arms Control Act, 22 U.S.C. §2276(b) (President's letter of offer to sell major defense equipment may be disapproved by concurrent resolution), which do not contain severability provisions.

The scope of the ruling is, in my view, as broad and as sweeping as the dissenting Justice noted in his separate opinion, conjecturing that the decision "also sounds the death knell for nearly 200 other statutory provisions in

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1/ Our theory was that the House resolution denying a stay of deportation, an "act of grace" from Congress in exercise of its plenary control over the admission and exclusion of aliens, Kliendienst v. Mandel, 408 U.S. 753, 766 (1972) quoting Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909) ("'Over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens"), did not alter the status quo respecting Chadha, who at all times was concededly deportable.

which Congress has reserved a 'legislative veto.'" Id., 51 U.S.L.W. at 4920 (White, J., dissenting).

Of course, technically the statutes which remain on the books are still valid, because they were not before the Court for decision. However, the holding of the case applied to other statutory contexts would surely produce the same result, leaving aside for the moment the severability issue. This point was brought home by the summary affirmances issued by the Court following Chadha in Consumers Energy Council v. FERC, supra, and Consumers Union of United States v. FTC, supra, involving respectively a one-house and two-house review of exercises of regulatory authority. The former statute did not contain a severability clause, and the court of appeals blithely stated that the presence or absence of the clause was "mostly irrelevant," Consumers Energy Council v. FERC, 673 F.2d at 442, the key question being instead "whether Congress would have enacted the remainder of the statute without the unconstitutional provision." Id. The cavalier treatment of the severability issue gives one pause to reflect on the liklihood of retrieving under the severability holding any part of what was lost on the constitutional merits.

So the question comes on the impact of Chadha on the statutes not before the court, including those emanating from this Committee. We in the Congress delude ourselves to the extent that we ignore the clear "storm warnings" of the Chadha ruling and insist, like those who after the discovery

of America continued to believe the earth was flat, that legislative vetoes are still valid. There are some statutory mechanisms which because they partake of "report and wait" provisions, or fall in other minor fissures in the otherwise seamless fabric of the decision, that will survive. INS v. Chadha, 51 U.S.L.W. at 4912, n.9. See, e.g., Federal Land Policy Management Act of 1976, Pub.L.No. 94-579 §204(e), 90 Stat. 2743, 43 U.S.C. §1714(e), Pacific Legal Foundation v. Watt, 529 F.Supp. 982 (D.Mont. 1981) reconsideration denied 529 F.Supp. 1194 (D.Mont. 1982). But, by and large, it is erroneous and foolhardy to continue to assert the validity of these mechanisms in the aftermath of Chadha. And the severability of the legislative veto from the rest of the statute is now the only remaining issue to be decided.

Generally, the invalid or offending part of a statute only is to be striken "unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not." Buckley v. Valeo, 424 U.S. 1,108 (1976).

Where Congress, as it did in Chadha, but did not in FERC, includes what is known as a severability clause, providing that he remainder of the Act shall not be affected by invalidity of a part, there is a presumption that the remainder of the Act is valid. As with all legal presumptions, it may be overcome by examination of Congressional intent which demonstrates clearly the opposite; namely, that

Congress would not have enacted "'the remainder of the Act'. . .if 'any particular provision' were held invalid." INS v. Chadha, 51 U.S.L.W. at 4911.

The War Powers Resolution, for example, contains a separability provision. A review of the legislative history reveals that the concurrent resolution veto provision was viewed as a necessary and integral alternative to the provision which preceded it--the automatic termination provision--in order to control the President's commitment of troops. War Powers Resolution §5(b), 87 Stat. 555, 556, 50 U.S.C. §1544(b) (providing that President must withdraw troops after 60 days absent declaration of war, specific authorization, or inability of Congress to meet) See, e.g., 119 Cong. Rec. 24689 (1973) ("Madame Chairman, 4(b) is the heart of the war powers resolution") (remarks of Rep. Zablocki); id., at 24690 ("I believe we must recognize that this amendment goes to the heart of this committee measure"). (Remarks of Rep. Bingham). 2/

2/ That the automatic termination provision of §5(b) was "the heart" of the War Powers Resolution is made clear by the absence of any controversy over the reporting and consultation provisions, which many regarded simply as redundant, or the codification of past practices. 119 Cong. Rec. 24689 (1973) (remarks of Rep. Zablocki)("In past Congresses we have passed resolutions which would have provided for consulting and reporting.") Indeed, Senator Eagleton, an early and persistent advocate for war powers legislation opposed the conference report because he considered the consultation and reporting provisions as insufficient without greater restraint on the ability of the President to commit troops. See, 119 Cong. Rec. 33555-33557 (1973). For example, Senator Eagleton viewed the compromise as avoiding the central issue of war powers, that being "whether we play in the game--in the decision making process--before the troops are committed or only after they are committed." Id., at 33557.

See also, H.R. Rep. No. 287, 93d Cong., 1st Sess. (1973) reprinted in The War Powers Resolution, Relevant Documents, Correspondence and Reports Prepared by the Subcomm. on International Security and Scientific Affairs of the House Comm. on Foreign Affairs, 97th Cong., 1st Sess. 26 (Comm. Print, June 1981 ed.) ("Subsection (c) is another of the resolution's major provisions. It provides for the termination of the President's action covered in the report through passage of a concurrent resolution by both Houses, before the end of the [60] day period referred to in section 4(b) and notwithstanding section 4(b)"); and 119 Cong. Rec. 24686 ("Or there is another alternative [to the President's veto of a congressional termination of troop commitment], and that is to use the provisions of section 4(c)") (remarks of Rep. Whalen).

Reviewing the legislative history in Chadha, the Court concluded that "it is not sufficient to rebut the presumption of severability. . .because there is insufficient evidence that Congress would have continued to subject itself to the onerous burdens of private bills had it known that §244(c)(2) would be held unconstitutional." 51 U.S.L.W. at 4911.

Further, because the remaining part after severance remains "'fully operative as a law'", id., quoting Champlin Refining Co. v. Corporation Comm'n., 286 U.S. 210, 234 (1932), and could be administered without the severed part, the Court concluded "a workable administrative mechanism [existed] without the one-House veto." Id., 51 U.S.L.W. at 4912.

As previously indicated, it is doubtful how far the courts will actually need to go to find the evidence of severability identified in Chadha. In very few instances does the legislative history reveal the kind of pervasive and abiding concern with delegating any power at all to the Executive which is entirely dependent on a legislative reservation. Mere "reluctan[ce] to delegate final authority," INS v. Chadha, 51 U.S.L.W. at 4911, is not enough; and while we in Congress, as participants in the conferences and negotiations which produced these statutes, may feel in our hearts that authority would not have been delegated without a veto, absent an overwhelming record to support our viscera, I believe the courts will find severability in many cases. Nor do I believe that Congress has an option, as some have suggested, to amend statutes to add or remove a separability provision at this time. Such post hoc attempts to engraft inseparability provisions on laws passed by prior Congresses would be doomed to fail in light of the element of contemporaneity of congressional intent which undergirds the Court's separability analysis.

And in summarily affirming the FERC decision, which did not contain a severability clause, the Court sowed further seeds of doubt about how thoroughly it will examine the issue in any later cases.

What the Court did not explain is how it severed, not section 244 as a whole, providing an integrated three-step procedure for granting cancellation of deportation orders, but only the second step of legislative review, and not the first and third steps of suspending and cancelling

deportation contained within the same section. In short, the section invalidated contained the very authority which permitted the Attorney General to cancel deportation. This amounts to nothing less than judicial legislating; in effect, recasting a procedural scheme to grant unreviewable finality to orders of the INS and Attorney General. INS v. Chadha, 51 U.S.L.W. at 4924, n. 16 (White, J., dissenting).

This feat of judicial redraftsmanship is indeed cause for alarm. Under the judicial rubric of "severability," it will permit courts to rewrite statutes carefully crafted after legislative compromise, and because we have, in my view, against our interest, but with pavlovian regularity inserted severability clauses like legal boilerplate in contracts, the Congress will be left with nothing or very little, while a wholesale delegation will remain intact.

If the Court's separability rulings presage judicial decisions on this question Congress has significantly fewer options to redress the balance of power shifted by Chadha to the Executive. Taking the War Powers Resolution, only as an example, and because I know it slightly better than the others, assuming arguendo it is severable, Congress is faced with the very erosion of power sought to be restored by the Resolution; for the President may either commit troops with impunity, resting on a legal position that the "concurrent resolution veto" is inoperative, or having reported the commitment as required by the reporting sections ignore with equal impunity the War Powers Resolution's requirements to recall those troops after 60 days, if Congress attempts

to enforce the automatic termination provision or to exercise the concurrent resolution veto provided by §5(c), 50 U.S.C. §1544(c). 3/

Similarly, under the International Security Assistance and Arms Control Act of 1976, Pub.L.No. 94-329, §211, 90 Stat. 729, 743, 22 U.S.C. 2276(b), the President's letter of offer to sell major defense equipment may be disapproved by concurrent resolution. After Chadha, there is no reason to believe this provision is constitutional and the President is free to ignore the restraints. Letter of Attorney General Civiletti to Secretary of Education Hufstedler (June 5, 1980) (advising Secretary of illegality of exercise of congressional veto over department regulations and "that you are entitled to implement the regulations in question in spite of Congress' disapproval.") See Consumers Energy Council v. FERC, 673 F.2d at 454 n.121.

And because Chadha opens up the floodgates to private litigants by according standing to those who challenge statutes on the ground that Congress has violated the Executive's rights, INS v. Chadha, 51 U.S.L.W. at 4912, even tacit acquiescence by the Executive to such statutory

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3/ The operation of §5(c) of WPR, 50 U.S.C. §1544(b), is clearly unconstitutional. The Congress clearly viewed it as the functional equivalent of a legislative veto at the time of passage. See H.R. Rep. No. 287, 93d Cong., 1st Sess. 29 (1973) ("There are many examples of legislative actions which have the effect of law without a Presidential signature.") Justice White construes the concurrent resolution as a legislative veto. Chadha v. INS, 51 U.S.L.W. at 4921. (White, J. dissenting). The question arises whether §5(b), 50 U.S.C. §1544(b), under which authority to commit troops automatically terminates unless Congress declares war, specifically authorizes use of troops, extends the period by law, or cannot meet as a result of an armed attack, also falls with §5(c). It could be argued that the action in

arrangements, if indeed that is even probable, [4/] cannot save the statutes from attack by aggrieved plaintiffs. So perhaps a President might determine to formally abide by a concurrent resolution disapproving a proposed sale of defense articles, or to informally abide by reading the congressional winds as counseling hesitation; but that is not the end of it, because a contractor who stands to lose, let us say, a $40 million defense contract by the unconstitutional accommodation between the branches may sue like every red-blooded American would, to contest the legislative review provision.

The disappointed defense contractor has standing; and in a little reported sentence in Chadha, the Court has worked one final mutation of our jurisprudence; it falls to

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[3/] Continued
terminating the President's authority to commit troops without affirmative action has the "purpose and effect of altering the legal rights duties and relations" of persons outside the Congress, including the President, and therefore has the purpose and effect of legislation. In Chadha, the majority rejected Justice White's suggestion that the Executive's submission of a decision for legislative review "is equivalent to a proposal for legislation and because Congressional approval is indicated by failure to veto, the one-House veto satisfied the requirement of bicameral approval." 51 U.S.L.W. at 4918, n.22. The Court rejected this interpretation on the theory that "to evade the strictures of the Constitution and in effect enact Executive proposals into law by mere silence cannot be squared with Art. I." Moreover, because no President has ever conceded the constitutionality of the War Powers Resolution, the decision is likely to be read at some time by the Executive as prohibiting the kind of passive disapproval authorized by the War Powers Resolution.

[4/] It was, after all, the bicameralism and presentment clause arguments advanced by the Executive which the Court adopted. See, Brief For the Immigration and Naturalization Service at 15-44, INS v. Chadha, supra and Tr. Oral Arg. at 40, line 23 through 41, line 3. (Dec. 7, 1982).

the House and Senate to litigate the case if the Executive, as it has done in all these cases, confesses unconstitutionality for "[w]e have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional." 51 U.S.L.W. at 4913. It therefore falls to congressional counsel in this brave new legal world established by Chadha to sally forth and meet the adversary aggrieved parties in the district and appellate courts. Ironically, by doing so, the Congress transforms a "friendly non-adversary proceeding," otherwise nonjusticiable, into a live suit the courts can decide. In one last Kafkaesque twist, the Congress thereby supplies adverseness and insures a ruling against its statute, which, but for its presence as a participant, the colluding friendly parties could not obtain.

And, in these instances, the only real issue will be the severability of the legislative veto from the remainder of the statute. In my view, private plaintiffs will have a heavy burden to demonstrate inseverability; and this time around, I would bet that rather than cast their lot with aggrieved plaintiffs attacking the statutes, having won the key constitutional issues, the Executive will be arguing to save the remainder of the provisions enacted with the veto to preserve the lion's share of their delegated authority.

This then is the sum and substance of Chadha and its impact on the congressional landscape.

Under these circumstances, it is my view that Congress is better served by wholesale repeal of the delegations effected by these statutes and a return to what lawyers call the status quo ante, or in everyday parlance, "the way we were."

And on this note, I would respond, as I have throughout, to some of the many provocative and thoughtful questions propounded by Mr. Ray Celada of the Congressional Research Service. I do not believe we can take any solace in the difficulty which would normally confront a litigant trying to get these statutes into court. On the basis of the Court's complete indifference to the Article III standing and "case or controversy" analysis, among others, I believe countless cases may well be brought, and no time was lost in doing on the heels of the decision. Indeed, on July 1, 1983, the American Federation of Government Employees brought suit to recover probably billions in comparability pay raises which they claim are due to federal workers. American Federation of Government Employees, et al. v. Ronald Reagan, Civil Action No. 83-1914 (D.D.C. filed, July 1, 1983). And herein lies yet another potential for wholesale transfer of power and responsibility from the Congress to another, less responsive branch--the courts--in addition to that already shifted from Congress to the Executive. In fact, in Crockett v. Reagan, 558 F.Supp. 893 (D.D.C. 1982) appeal docketed (D.C. Cir.) a district court

has decided that although the fact finding necessary to determine whether U.S. troops have been introduced into hostilities renders a suit against the Executive for violation of the War Powers Resolution non-justiciable, "it leaves open the possibility for a court to order that a report be filed or, alternatively, withdrawal 60 days after a report was filed or required to be filed by a court or Congress." Crockett v. Reagan, 558 F.Supp. at 901. Perhaps more horrifying than the proposition that the President alone can decide under what circumstances to commit our troops, is the spectre that life-tenured federal judges could somehow, under the umbrella of the War Powers Resolution, interject themselves into the sensitive decision-making process with respect to war-making.

Whatever the intent of the Framers with respect to the relative powers of Congress and the Executive in the war powers area, it clearly could not have been to allow the federal courts any role in the determination of national policy in making war.

The Congress is now faced with a fundamental decision: how to restore the balance rendered askew by the Chadha case. And in making a decision, the Congress should remember, even if the Court's do not, that we are talking about great and vast powers, what has been called a virtual armamentarium, vested in the elected representatives for a purpose: to retain accountability. Read the Constitution and compare the powers conferred on the Congress and those

conferred on the Executive. Is there any genuine dispute that it is Congress which has arrayed on the Article I side of the ledger the most explicit and direct say over the political and policy lifeblood of the Nation?

Justice White's separate opinion explains for me, why the alternatives to the veto are, in one way or another, unsatisfactory. INS v. Chadha, 51 U.S.L.W. at 4922, n.10. To be sure, oversight of executive branch decision making is available. But we have recent experience with several Executives who have asserted that congressional oversight of the executive branch administration of laws constitutes interference in the decision making process delegated to the Executives and that Congress' interest in oversight is "considerably weaker" than its interest in specific legislative proposals. See Letter from Attorney General Smith to President Reagan, October 13, 1981, reprinted in Contempt of Congress: Hearings before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce, Congressional Proceedings Against Interior Secretary James G. Watt for Withholding Subpoenaed Documents and For Failure to Answer Questions Relating To Reciprocity Under The Mineral Lands Leasing Act, 97th Cong., 1st Sess. 104, 106 (1982), and Letter from Lloyd N. Cutler, Counsel to the President to Chairman Toby Moffett, May 15, 1980, reprinted in The Petroleum Import Fee: Department of Energy Oversight, Eighteenth Report By the Comm. on Government Operations, H.R. Rep. No. 1099, 96th Cong., 2d Sess. 43, 44

(1980). And, the courts for their part, have also, on occasion, invalidated agency action found to have been actually motivated by undue congressional influence, D.C. Federation of Civic Ass'ns. v. Volpe, 459 F.2d 1231, 1248 (D.C. Cir. 1972), or which gives the appearance of having deprived parties of unbiased decisions by agency heads. Pillsbury Co. v. FTC, 354 F.2d 952 (5th Cir. 1966).

These methods of correcting agency abuse or misdirection are imperfect at best.

During consideration of the Consumer Product Safety Commission authorization in the wake of the decision, amendments were adopted which would require the positive approval of both Houses and the President before any safety standard could go into effect. 129 Cong. Rec. H4771 (daily ed., June 29, 1983). This committee must gauge whether the solution to the dilemma posed by Chadha achieved in that instance is feasible in the areas over which you are vested with jurisdiction, involving as they do sensitive relations with sovereign nations and on occasion, considerations of time and rapidly changing international situations.

My own view is, as an advocate for the House of Representatives, that we "wipe the slate clean" and repeal all delegations which were enacted under the now erroneous assumptions made before Chadha. Justice White has framed the dilemma Congress must now confront in stark terms: "Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with the hopeless task of writing laws with the requisite specificity to cover endless special circumstances

across the entire policy landscape, or in the alternative, abdicate its lawmaking function to the executive branch and independent agencies." 51 U.S.L.W. at 4921. For me the choice is clear, and I can conceive of no supportable argument that we should abdicate our legislative responsibility; nor would the electorate tolerate a wholesale avoidance of responsibility when once they perceived the effects of such an abdication.

It was, after all, an emboldened Executive which attacked these statutes as unconstitutional on every front to provide a "'vital check against tyranny'", Brief for the Immigration and Naturalization Service as 27, INS v. Chadha, supra, and it was the Executive in its arguments to the courts which elevated the requirements of Art. I, §7 to inescapable procedural restrictions on the Congress on the ground that "[a]lthough the Constitution is certainly flexible, it cannot be stretched so far as to permit a plainly invalid procedure simply because Congress does not wish to use the power it already has." Brief for the Defendant Federal Trade Commission at 46, Consumers Union of the United States v. FTC, 691 F.2d 575 (D.C. Cir. 1982) (en banc). Having succeeded in convincing the Court that striking down the veto was necessary despite its utility because "'the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. . .not to avoid friction, but by means of inevitable friction incident to

the distribution of governmental powers among three departments, to save the people from autocracy," id., quoting Myers v. United States, 272 U.S. at 293, let the Executive now utilize the procedures it argued were essential and unbending to preclude legislative tyranny to obtain needed authority on a case by case basis. The Executive cannot now be heard to complain that subjecting its authority to bicameral review and presentment threatens the workability of our government. Congress should shift the burden to the Executive to convince the Congress on a case by case basis that it needs unreviewable authority.

In the ultimate analysis, the remedy devised by this Committee, and others, should be premised not on the lawyer's advice or legal scholarship, however erudite, for it was after all the legal theorists writing in journals who supplied much of the impetus for destruction of the legislative veto. It should rest instead on the firm conviction that this dispute between the political departments of government over who should make decisions must be resolved in favor of those who are vested with the constitutional responsibility of governing in all these areas.

Chairman ZABLOCKI. Thank you, Mr. Brand.

ALTERNATIVES TO THE LEGISLATIVE VETO

In your opening remarks you wondered if you would be welcome again before this committee. I commented, "Have no fear." But you surely have awakened a deep concern of the gentleman from Wisconsin as you assess the War Powers Act as affected by the Supreme Court decision.

On page 15, and later on page 19, you advocate the repeal of all delegation authority to the executive branch and a return to the status quo ante. While this approach may be the logical theoretical answer to this problem, it does not address the practical problems that will arise.

Congress is already overwhelmed with its ever-increasing workload. If Congress is forced to promulgate every administrative regulation, I am afraid its workload would proliferate to an unacceptable level.

Second, if Congress attempts to do what you suggest, will the executive approve it? It seems to me we are running around in circles. Do you have any alternatives that would preserve the status quo and meet the Supreme Court's test under *Chadha?*

Mr. BRAND. I certainly appreciate the practical problems that you raise In fact, there were many in the Congress who were both publicly and privately opposed to the veto on that ground, that it would overwhelm the Congress with work.

In fact, in returning from the Supreme Court to announce to my clients on the floor of the Chamber that we had lost, I was never greeted with so many relieved losing clients as I was in the day that this decision was rendered.

I have given you first what I think the constitutional imperatives of the situation are if the Congress is to reclaim its power As to the practical concerns, I think the committee has to decide which are the most important to it, which are the areas where it truly would not have delegated final and unreviewable authority to the executive without some reservation, and focus, at least in the first instance, on those, without necessarily including any judgment for the time being on some of the other perhaps less compelling measures that the committee has reported over the years.

As far as alternatives, I mentioned one, which was the alternative the House voted on the floor last week with respect to the Consumer Product Safety Commission; that is, an approval or disapproval of all regulations.

You have rightfully pointed out the problem with that approach. I am not even sure that it is feasible to engraft that approach on this committee, given the fact that you deal in a realm of international affairs and not domestic affairs, where time may be of the essence and where other factors play a significant role.

There are other devices which the court specifically indicated were constitutional. The so-called report and wait, where the executive proposes a change and it lays over for a specified period of time, during which Congress can amend by passing a law the standard, revoke it entirely or change it in some way. Again, I

don't know how feasible that is for this committee in terms of the subject matter that you deal with.

Those are some of the alternatives. There is one other alternative which I dare not talk about to an authorizing committee, I don't think, and that is the appropriations rider. The decision clearly holds that out in the footnote as one potential way of reigning in the executive to adhere to the standards that Congress believes should apply.

That is a canvass of the general ways in which Congress can reclaim consistent with this decision.

Chairman ZABLOCKI. Mr. Brand, you have certainly presumed correctly that your last alternative would not be acceptable to this committee.

Mr. BRAND. Nor, quite frankly, do I believe it necessarily would be acceptable to the House as an institution. It is there as an option.

Chairman ZABLOCKI. Unless we returned way back in history, when the authorizing and the appropriating committee were one and the same, I wouldn't agree to that last alternative. However, I want to ask one final question.

As counsel to the House of Representatives, would you be willing to work with our committee counsel on a priority list of the legislation which is affected by the Supreme Court decision on *Chadha* and what priorities we should set?

Mr. BRAND. Absolutely.

Chairman ZABLOCKI. There is no doubt in my mind there are certain statutes with the concurrent resolution—legislative veto, that is—that should be given the highest priority, the earliest consideration.

Further, I would hope that the executive branch would realize that, in the final analysis, they need the cooperation of Congress. Therefore, we should work this problem out together, as I said in my opening statement.

Mr. Fascell?

CONGRESSIONAL CONTROL OVER DELEGATED AUTHORITY

Mr. FASCELL. Thank you, Mr. Chairman.

Mr. Brand, let me see if I understand this. From your testimony, and my cursory reading of that opinion, I conclude that the Congress can adopt no provision which would delegate authority to the executive on a condition subsequent. Let me amend that to a legislative condition subsequent.

Mr. BRAND. Right.

Mr. FASCELL. It does not rule out nonlegislative conditions subsequent?

Mr. BRAND That is one of the ironies of the decision. The only people who cannot have delegated authority are the people with constitutional authority to delegate, that is the legislators. You can delegate to farmers, you can delegate to executive branch officials, you can delegate to your heart's content——

Mr. FASCELL. So you can have conditions subsequent as long as it doesn't involve the legislature?

Mr. BRAND. That would appear to be the reach of the decision.

Mr. FASCELL. What is your opinion with respect to conditions precedent or conditions concurrent? I mean legislative now, not nonlegislative conditions.

Mr. BRAND. Well, we argued that in the court of appeals and lost.

Mr. FASCELL. You argued it in what sense, that the Congress has the authority to attach a condition precedent to the exercise of delegated authority?

Mr. BRAND Yes.

Mr. FASCELL. Refresh my memory. What kind of statute are we talking about? In what area?

Mr. BRAND. Well, we talked about two principally: The *FERC* decision, the one-House veto over the natural gas pricing mechanism; and the second one, a two-House veto over the so-called used car rule promulgated by the FTC.

Mr. FASCELL. But that is a condition subsequent.

Mr. BRAND. In some sense it is.

Mr. FASCELL. Well, you delegate the authority with the reservation back for legislative action subsequent to the executive delegation.

Mr. BRAND. Right.

Mr. FASCELL. That is not a condition precedent.

Mr. BRAND. Well, I guess I need to get a sense of how you envision the condition precedent would operate.

Mr. FASCELL. In the normal legal sense. You can't do so and so prior to something else happening.

Mr. BRAND. An event——

Mr. FASCELL. Or legislative action?

Mr. BRAND I think I know where you are heading. I am not quite sure, given the——

Mr FASCELL. I am not quite sure where I am headed yet, but go ahead.

Mr. BRAND. I am too used to dealing with judges, maybe, and trying to second guess where they are going.

Mr. FASCELL. If I were a judge, I would be down below the level of this bench, staring at you with deep eyes of suspicion.

Mr. BRAND. I am sure many of them do that. [Laughter.]

The entire condition subsequent/condition precedent analysis was never anything the courts adopted. We engrafted that on situations that we thought existed. It made some sense in light of the Supreme Court's prior rulings on *Rock Royal* and *Currin* v. *Wallace.*

I think a good part of that analysis is out the window because of the way in which the court has defined what legislation is. Legislation has "the purpose and effect of altering the rights and relationships of people outside the legislative branch and is the making of policy." Any time you make policy you have to do it by passing a bicameral bill and presentment to the President.

I think the decision doctrinally comes about as close as you could possibly come to saying that Congress cannot delegate.

Mr. FASCELL. Excuse me. I think it says that the only way Congress can delegate is an absolute delegation.

Mr. BRAND. That is right.

Mr. FASCELL. There is a big difference. We can delegate. The question is whether we want to or not.

Mr. BRAND. That is right, because it comes around full circle and becomes an unreviewable delegation.

Mr. FASCELL. It is unreviewable except in the normal senses that we understand oversight, which is really meaningless. There is no way we can oversight. GAO, which has thousands of people at its disposal as an arm of the Congress, can get around to agency budgets about once every 18 months.

The greatest oversight in the world in the Congress just barely scratches the surface of a single contract in the Department of Defense. Oversight is meaningless, let's face it. We go through almost a charade in the Congress in exercising our oversight responsibilities.

I am not too keen on that. That leaves us really fundamentally to the power of the purse You just don't give the Executive the authority or you don't give him the money or both. That is where the Supreme Court left us.

Mr. BRAND. I would agree with that.

Mr. FASCELL. If that is true, how can the consumer product safety legislation be valid? I think it is unconstitutional on its face in light of this decision. You can't say to the agency that has the delegated authority to promulgate rules and regulations, "You have that authority but you have to send all the rules and regulations to the Congress. Then we will pass another law deciding whether or not you can implement them." I think it is clearly within the purview of this decision.

Mr. BRAND. Well, that is interesting that you raise that because I myself conjectured that that might be a problem. Several people tried to take my head off when I suggested that there might be a problem in the return trip review because Congress was not, by that action, changing the organic enabling statute which effected the delegation initially.

The rejoinder to that is that as long as Congress jumps through the procedural hoops that the court has now elevated to substance, we can do that to our heart's content. As long as we call it an act of Congress and send it to the other body and have the President sign it, we have complied with their procedures.

That, of course, is the beguiling thing about this decision, is that it elevates form over substance and says as long as we dot the "i's" and cross the "t's" we can pretty much run roughshod over the Executive, notwithstanding the initial delegation.

Mr. FASCELL. I don't know that I agree with that conclusion It is pretty difficult to ride roughshod over the President if the President vetoes a bill.

Mr. BRAND Given a veto power.

Mr. FASCELL. Right. So I don't know that I agree with that.

Mr. BRAND. As a purely procedural matter.

Mr. FASCELL. Yes. You know, I agree with your original conclusion, which is that the Congress is now forced into the specificity of delegated authority. I am not sure that you can get back to the status quo ante

That is almost impossible because that means repealing every piece of legislation where you had delegated authority to the Executive which he would veto. He would have to, because the Government couldn't operate. We have delegated all over the place: in-

dependent agencies, the chief executive, my goodness, to groups of people who are not in the Federal Government. Congress has delegated all kinds of authority. I don't know how in the world that would work.

Right now it seems to me that the only thing we can do, looking to the future, is simply be extremely cautious about any more delegation of authority. It may take us 100 years to recoup what this decision has done.

Thank you, Mr. Chairman.

Chairman ZABLOCKI. Mr. Pritchard.

EFFECT OF "CHADHA" DECISION ON CONGRESSIONAL AUTHORITY TO DECLARE WAR

Mr. PRITCHARD. Thank you, Mr. Chairman.

Do you see any difference in the war powers legislation since it so specifically says in the Constitution that we hold that power?

Mr. BRAND. I don't really. I know that one of the arguments I am always met with in dealing with the committees is "No, but we have plenary authority under the Constitution to write immigration laws," or "We have plenary authority to coin money," or "We have plenary authority to raise armies and navies."

There is really nothing over which Congress doesn't have plenary authority. Clearly in the warmaking area it has plenary authority, if you read the text, but in the face of those plenary powers conferred in article I, in *Chadha* you must remember that the President had no textual basis. He is standing there, under article II, stark naked, as it were, constitutionally. He has nothing until we decided to vest some portion of our authority in the Immigration and Naturalization Service.

I don't see that as a way around the dilemma in *Chadha.* Indeed, I think in some of these areas we are in a weaker position because the President can at least point to a few words in the Constitution that make him Commander in Chief and head of our foreign policy.

I don't concede—because I don't want to give away my cases—that those words mean what he will say they mean or what past Presidents have said they mean, but they are at least there.

My own view is that the decision really ignores and fails to take account of those very plenary grants, which in this case, as I say, were arrayed against nothing on the article II side of the ledger.

"CHADHA" DECISION REQUIRES REASSESSMENT OF EXECUTIVE LEGISLATIVE PREROGATIVES

Mr. PRITCHARD. It seems to me the President has the whip hand in all of this now because he can veto anything we pass. All Presidents, once they get in office, become very strong about protecting the President's prerogatives. They don't want to go down in history as eroding the President's authority.

This is going to take years to straighten out, isn't it?

Mr. BRAND. I don't know if I quite go as far as Congressman Fascell's assessment of 100 years, but certainly several decades. I think there is just a tremendous overdeference to the Executive and the courts

Maybe it is even an acculturated phenomenon that people, despite the very, in my view, paltry textual commitments to the President under article II, look to the President as the main residuum of governmental power. Certainly the Constitution doesn't read that way.

I would agree that to undo this decision through the means that are still available constitutionally to us entails a good deal of difficulty; not just constitutional difficulty but practical difficulty.

ALTERNATIVES TO THE LEGISLATIVE VETO

Mr. PRITCHARD. Are there any other means to address this problem?

Mr. BRAND. Everything I have read so far has addressed the major means at our disposal: refusal to delegate in the first instance; delegation with great specificity, although that is fraught with difficulty, given that you can't really foresee all the instances in which a particular authority will be exercised.

That is why the veto, in my view, is such a good device. It was a surgical way of taking a second look and just saying that an agency had gone beyond its congressional intent, and where better to get that than from the Congress?

There is the "report and wait" provision, which has been discussed. Again, I question its feasibility for this committee, and some of the others that have been mentioned: the power of the purse and the restrictions placed on the delegation. I think that is about it.

CONGRESSIONAL AUTHORITY THROUGH THE APPROPRIATION PROCESS

Mr. PRITCHARD. If we use the power of restricting the purse, which seems to me always the ultimate weapon around here, we will further skew the legislative process, won't we?

Mr. BRAND. You will skew it toward the appropriating committees.

Mr. PRITCHARD. It is getting too bad already.

Mr. BRAND. That is something that is an internal effect of the decision that has no real effect outside the legislation.

Mr. PRITCHARD. But for Congress it is going to be a major change?

Mr. BRAND. Yes.

Mr. PRITCHARD. I don't see any way out.

Mr. BRAND. I failed to mention one other alternative which I jokingly mentioned to one of the members; that is, court packing.

Mr. PRITCHARD. That is pretty hard to do.

Mr. BRAND. It has been tried before and failed.

Mr. PRITCHARD. Thank you, Mr. Chairman.

Chairman ZABLOCKI. I don't think we want through that extreme.

Mr. Solarz.

LEGISLATIVE VETO IN WAR POWERS RESOLUTION INVALID

Mr. SOLARZ. Thank you, Mr. Chairman.

Mr. Brand, I want to compliment you on some very thoughtful testimony. I would like to focus on the war powers resolution and on the Arms Export Control Act.

With respect to the war powers resolution, I gather the legislative veto contained therein, in which Congress has the right, through the adoption of a concurrent resolution, to order the withdrawal of American forces from situations in which they have been involved overseas is now presumptively invalid.

Is that correct?

Mr. BRAND I think so.

Mr. SOLARZ. What about the remaining provision in the war powers resolution——

Mr BRAND. The automatic termination provision?

Mr. SOLARZ [continuing]. That within 60 days, unless the Congress adopts a joint resolution approving the continued presence of American forces, the forces must be withdrawn. Is it your judgment that that remains valid?

Mr. BRAND. I talked about that in some footnotes in my statement. I didn't read those into the hearing. I can see the argument being fashioned that 5(b) falls with 5(c) because they are integrally——

Mr. SOLARZ. 5(b) and 5(c)? Talk in layman's language.

Mr. BRAND. I am sorry. The concurrent resolution veto provision is integrally related to the automatic 60-day termination proceeding, at least under one interpretation of it.

In addition, no President has ever conceded the constitutionality of the war powers resolution aside from the veto.

STATUS OF JOINT RESOLUTION TO APPROVE CONTINUED PRESENCE OF U.S. TROOPS ABROAD

Mr. SOLARZ. Let me ask you this. Assuming the courts were to find that the legislative veto was separable from the rest of the war powers resolution, would the requirement that the Congress adopt a joint resolution approving the continued presence of American troops in your view remain valid?

Mr. BRAND. As that provision now stands?

Mr. SOLARZ. Right.

Mr. BRAND. It may or may not be because of the Presidents' consistent position—not this President, all Presidents' consistent position—that you cannot force the executive to take action by mere silence.

VALIDITY OF JOINT RESOLUTION OF APPROVAL CONTAINED IN ARMS EXPORT CONTROL ACT

Mr. SOLARZ. Let me then ask you about the Arms Export Control Act. We clearly have lost our legislative veto there. What would be your view with respect to the constitutionality of legislation which would provide, hypothetically, that for all arms sales over a certain threshold, except perhaps for particular countries that could be exempted, that the President would have to notify the Congress of his intention to approve a sale and then the Congress, in order for that sale to go forward, would have to enact a joint resolution ap-

proving the sale, possibly with expedited procedures designed to guarantee a vote in both the House and the Senate?

In your view, would such an approach be presumptively constitutional or not?

Mr. BRAND. I would argue it is

Mr. SOLARZ Would you agree that it is clearly constitutional?

Mr. BRAND. Yes; it is an act of Congress, and that is what the Court said we have to do, leaving aside Congressman Fascell's debate over——

Mr. SOLARZ. It does seem to me that that is a way of squaring the circle with respect to arms sales abroad, by giving the administration some discretion, yet maintaining some congressional control.

You said in your testimony that you thought that the way to deal with this is to repeal whatever delegations of power we have made to the President I would like to know with respect both to the Arms Export Control Act and the war powers resolution what specifically that advice entails. Have we delegated anything to the President in terms of arms sales that he didn't already have?

Mr. BRAND I don't know that the President has ever claimed that he has a right to sell arms overseas to anyone absent a congressional authorization to do that.

Mr. SOLARZ. Why do you need any congressional authorization for an arms manufacturer to sell arms overseas, any more than you need to sell shoes?

Mr. BRAND. That is right To the extent you are talking about private transactions unregulated by any overarching scheme, that is probably correct.

As I read the Arms Export Control Act veto provisions which were, by the way, engrafted after the rest of the statute was passed—and I think that is a separate problem that presents a problem on severability—I think you have at least delegated him the authority under the statute to unilaterally decide to sell arms absent a congressional approval.

VALIDITY OF JOINT RESOLUTIONS OF APPROVAL CONTAINED IN NUCLEAR NON-PROLIFERATION PROVISION OF FOREIGN ASSISTANCE ACT

Mr. SOLARZ. Let me ask you one other question. We adopted legislation about a year or so ago in which we provided with respect to the question of nuclear proliferation that in the event a country explodes a nuclear device all military assistance to that country has to be terminated, unless the President issues a waiver on the grounds that the national security requires us to continue providing the aid.

Then we also provided that unless the Congress within 30 days adopts a joint resolution approving the Presidential waiver, all the aid is terminated at the end of the 30 days.

In your judgment, in light of this decision, is that the legislation presumptively constitutional or does that go the way of legislative veto?

Mr. BRAND. As you describe it, I have not looked at every one of these. I think that is a variation on the same theme. It is a delegation and an attempt by Congress to get a second look at the execu-

tion of that delegation by the President absent plenary legislative consideration.

Mr. SOLARZ. Which means what?

Mr. BRAND. Which means that it is invalid under the rationale of this decision.

Mr SOLARZ. No; what the legislation says is all aid is terminated if another country explodes a nuclear device.

Mr. BRAND. Unless the President waives.

Mr. SOLARZ. No; unless two things happen: the President waives, and the Congress approves the waiver.

Mr. BRAND. When the President waives, I think at that point there is an argument that the President can make, or the Executive, that what comes after that by way of review of that waiver by anything less than a two-House bill that is presented back to the President is infirm under this decision.

Mr. SOLARZ. That is what they would argue. Would you agree with the argument, in light of the decision?

Mr. BRAND. As I said, I don't want to give away my cases. I will argue what is at issue in the case at the time. I am trying to advise the committee as a matter of policy and prospective judgment about how they ought to view this case and respond to it. I think a strong argument can be made by the executive that that is similarly infirm.

Mr. SOLARZ How is that any different—and this is my final question—from the hypothetical situation I have described involving arms sales, where we would give the President the right to say to the Congress he would like to sell arms above a certain level to a foreign country but the sale can't go forward unless both Houses adopt a joint resolution approving it?

How is that any different from the other situation where the President says in spite of a nuclear explosion by another country, I think on national security grounds we should continue the aid but the Congress, unless it approves that determination, in effect terminates——

Mr. BRAND. Unless I missed something in the hypothetical on the nonproliferation area—that was by concurrent resolution or joint resolution?

Mr. SOLARZ. Joint resolution.

Mr. BRAND. To the extent that anything is by joint resolution and that is submitted to the President, I don't think that is a problem under the decision.

Mr. SOLARZ. Right. It was by joint resolution.

Mr. BRAND. The key element is——

Mr. SOLARZ. The joint resolution of approval.

Mr. BRAND. That is right.

Mr. SOLARZ. And you think then it is OK?

Mr. BRAND. Yes.

Mr. SOLARZ. Good.

Thank you very much.

Chairman ZABLOCKI. Mr. Torricelli.

EFFECT OF CHADHA DECISION ON COMMITTEE LANGUAGE CONCERNING EL SALVADOR

Mr TORRICELLI. Thank you, Mr. Chairman.

I would like to ask your view on the status now of the lengthy negotiations we held in this committee on aid to El Salvador. The provisions are being placed in there There was the assumption of those who were for it and against it that they were an integral part of the legislation. It has now left this committee

In your view, what is the status of that legislation now that it has worked its way partially through the legislative process with an invalid provision?

Mr. BRAND. Is this the provision referred to earlier by the chairman that was sent to the Rules Committee, which the Rules Committee sent back for reconsideration?

I assume the Rules Committee was proceeding on the same assumptions that we have been proceeding on this morning; that is, that the decision, while not retroactive, casts serious doubt over these devices, all of them, and that to the extent we are now on notice of that fact, we ought to be restructuring our legislative initiatives to reflect——

Mr. TORRICELLI. So it should be returning to this committee since there is an assumption that there is an invalid provision in it? My concern is that a piece of legislation is going to work its way through the Congress, thus having given approval on a false assumption, giving the administration the money that it requested, but we are not, in turn, getting the authority that we were seeking in return for the money.

Mr. BRAND The House doesn't have a rule which says it can't pass unconstitutional laws. We read what the decisions say and try to order our affairs accordingly. As a matter of internal procedure, there is nothing to prevent the Congress from passing that law as reported from the committee. I think it was more of a prudential concern that Congress ought not to be passing such provisions which so clearly are rendered dubious by this decision.

Mr. TORRICELLI. It may be done, but we are relying upon good judgment to do so?

Mr. BRAND. Right.

SEVERABILITY OF LEGISLATION VETO PROVISION WAR POWERS RESOLUTION

Mr. TORRICELLI. Let me return a little bit to Mr Solarz' question on severability and the War Powers Act. I would like to get it clear in my own mind.

In your judgment as of this moment, if the President were to employ American troops abroad in hostile action, although the veto provisions would not, presumably, have an effect, all other reporting and other requirements of the act would.

Is that your opinion?

Mr. BRAND. If the statute is deemed severable, that would be correct. The rest would remain as a valid, workable unit. The question is whether it really is severable given the fact that I think the heart of the resolution was not the veto precisely but the automatic termination provision.

Chairman ZABLOCKI. But there is section 9, which did provide that if any part of the act would be found unconstitutional or inapplicable, the rest of the act would stand.

Mr. BRAND. That is right. That provision would have to be overcome, in effect, by a very strong showing that Congress would not, in fact, have passed the rest of it without the veto provision.

JOINT RESOLUTION APPROVAL ON ARMS SALES

Mr. TORRICELLI. Returning again to Mr. Solarz' questioning on the Arms Export Act, I take it the clearest way to reassert some congressional authority there is to require in certain categories or countries for arms sales, that there be a positive action now by Congress, uniform approval?

Mr. BRAND. Either by House joint resolution or an act of Congress, which are, in my view, functionally equivalent.

UTILITY OF REPORT AND WAIT PROVISION

Mr. TORRICELLI. What is your view of the report and wait statutes approach to solving this dilemma?

Mr. BRAND. There is a footnote in the decision that holds those out. Ironically enough, those are all the statutes where the courts get their authority to render rules. So, they have saved themselves from their own decision.

The report and wait again places a heavy burden on the Congress, as the chairman has indicated. It says basically that the effectiveness of this provision is stayed for some certain period for Congress to review it. Congress can further stay it or change it, but only by a plenary act of Congress.

So that in some sense puts you eventually back in the same situation that you are in now. You must pass, if you want to change what has been reported. You must change the statute by two-House consideration and presentment to the President.

TENDENCY OF EXECUTIVE TO CONTROL DELEGATED AUTHORITY

Mr TORRICELLI. I would have to note at this how interesting it is to see the Attorney General, presumably speaking on behalf of the administration, now gleefully accepting this after the President campaigned for office presumably wanting to control executive authority. Your perspective changes quickly when the power is your own that is going to be gained because there is a virtual flood of power going down Pennsylvania Avenue.

Mr. BRAND. It wasn't only this President, it was all Presidents who had spoken on both sides of the issue. They wanted very much to get the delegations. They would do that, and then they would turn around in court and attack the statutes that had been passed. In fact, the *Chadha* case is a case that began in 1978 and 1979, prior to this administration's tenure.

CHADHA DECISION REQUIRES CONGRESSIONAL SPECIFICITY IN DELEGATION OF AUTHORITY

Mr. TORRICELLI. Just the thought of the kind of specificity that we are going to have to achieve in legislating in the future to stop

grants of authority that we do not want to provide is almost incomprehensible, especially from a court which itself considers itself overwhelmed in having to deal with specificity in matters it shouldn't have to deal with.

Thank you very much.

Chairman ZABLOCKI. Mr. Leach.

Mr. LEACH. No questions, Mr. Chairman.

Chairman ZABLOCKI. Mr. Hyde?

LEGISLATIVE POWER EXEMPLIFIED BY CONGRESSIONAL FLOOR DEBATE

Mr. HYDE. Thank you, Mr. Chairman.

I, too, commend Mr. Brand for a very superb presentation of a very difficult problem. We have heard about the imperial presidency ever since President Nixon ascended to the throne. We have heard about the imperial judiciary periodically as they make their pronouncements from Mount Olympus.

The phrase "imperial Congress" doesn't get handed around much, but as I notice in this constant Indian wrestling for power, Congress is very capable of feeling and expressing a little distemper when someone wants the checks and balances to get back in line.

Personally I am amused and enjoying the consternation over what the Democrats have done to the Holman rule, and now it is obviously one way to get around this very serious problem, but very difficult because of the change in the rules.

I have always felt that democracy found its ultimate expression in voting on the floor, in debate and in voting on the floor, not in the confines of a committee or a subcommittee, where, forgive me, when abused, the petty tyranny of a subcommittee chairman can extinguish legislation as though it were never filed. It seems to me democracy flowers when this legislation reaches the floor for debate, where majority vote can pass it or reject it.

Far from skewing it toward the Appropriations Committee, the Members get to vote on these things on the floor. But if they never see the light of day out of a committee, I do not see that as democracy's finest hour.

I guess what I am saying is the appropriations process is very important. I have no compunction against permitting retrenchments amending the appropriation bill to accomplish what we want.

That is just my own personal feeling.

PROPOSAL FOR CONSTITUTIONAL AMENDMENT TO PROVIDE FOR PRESIDENTIAL LINE-ITEM VETO AND CONGRESSIONAL VETO BY RESOLUTION

I was interested in Mr. Solarz' discussion of the nuclear explosion legislation, where any country—I am sure there would be exceptions to this if it ever reached that point—that explodes a nuclear device, no aid to that country unless a Presidential waiver, and then the Presidential waiver has to be approved by two Houses.

I note that a full moon is not required upon the approval of the Presidential waiver of what happened. That is a concession, I suppose, of liberality to the President.

I have often thought, as long as we are on this generic subject, that a line-item veto might be very useful for the President. I know

we are talking about recouping congressional power that has been stolen from us by an arrogant court, but I have often thought a trade off—I am toying with introducing a constitutional amendment that would provide the President with a line-item veto—something that 45 Governors have but the Senate doesn't want to give it to the President because it would un-Christmas tree some appropriations—and then a two-House veto by resolution as the trade off: We give the President a little; we recapture a little.

That idea seems to have some merit. I will talk to you about it privately, where I would be interested in your views, both legal and psychological.

Mr. BRAND. I would say that it certainly would—I think my job stops at the point at which the Supreme Court renders a decision. Whether that is the final stage of the constitutional process or not, I take no position on, but certainly I would be happy to advise you.

Mr. HYDE. It just seems to me a trade off there might be very salutary for the country, to give the President the power to line-item veto. That would stop the gamesmanship at the end of the session, when we come in with a continuing resolution and he has got to take, as Jane Ace used to say, the bitter with the better.

Here he could veto the things that are outrageous, and then if we feel strongly about them, we could override that line item veto. Meanwhile, Government could continue, the checks could go out and the bridges could be built. A two-House veto by resolution, rather than requiring Presidential signature, might be an interesting trade off.

Mr. BRAND. The court, in effect, gave him that power because in the court of appeals on the used car case we argued over the authority we have given and that which we had kept in the *FERC* case.

The court said, "Well, the President signs the vetoes in it because he has to, because they include urgent other matters which the Government needs to keep functioning. So, we are not going to hold him to his signing of the bill," even though we had held out the argument that if he didn't like it he should exercise his constitutional power to veto.

The fact that he found that as a matter of policy unappealing shouldn't change the text of the Constitution, that he should be put to his constitutional remedies, just as we are. In some sense, I think the decision can be read as providing just such an item veto, given the way the courts are willing to save the President from having to exercise his veto.

Mr. HYDE. My time is up, but you and I can agree the better way to do it is for the Constitution to say that, rather than have the courts say that is what the Constitution says, when clearly it doesn't.

Thank you.

Chairman ZABLOCKI. Before I ask a question of the witness I would appreciate a clarification on one point. Did the gentleman from Illinois limit the tyranny of chairmen to the subcommittee chairmen? [Laughter]

Mr HYDE If there is one chairman in this entire body that is certainly not a tyrant but indeed a Pericles reincarnated, it is yourself, Mr. Zablocki

SEVERABILITY CLAUSE UPHOLDS CONSTITUTIONALITY REMAINING REQUIREMENT OF WAR POWERS RESOLUTION

Chairman ZABLOCKI. I thank the gentleman from Illinois.

As the principal sponsor of the War Powers Act, it would appear that section 5(b), providing for a concurrent-resolution veto, is unconsitutional under the Supreme Court decision.

Since section 9 has a severability clause, the President still, under your interpretation of the War Powers Act, would have to report within 48 hours. In fact, he should abide by all of the other provisions of the act because the act is still constitutional, despite the exclusion of the legislative veto provsion.

Mr. BRAND. If it is severable, that is correct.

Chairman ZABLOCKI. The Congress is not precluded from receiving a report from the President on military personnel sent to an area of conflict or imminent conflict. The Congress it not precluded from acting by joint resolution. Is this not a possible solution for Congress in dealing with the situation?

Mr BRAND. Yes.

IMPLICATIONS OF "CHADHA" DECISION ON VALIDITY OF JOINT RESOLUTION

Mr. FASCELL. Mr. Chairman, let me interrupt right there because I am confused about that.

In asking you the question with regard to the consumer legislation that just went through the Congress, I am inclined to agree with your original conclusion, which is that the Congress could not, even by joint resolution presented to the President, reserve the right to act on previously delegated authority and so, therefore, could not even, by joint resolution and presentment, legislate whether regulations are to be implemented or not implemented, depending on the subsequent legislative action of the Congress.

Mr. BRAND. I am trying to walk the line between giving away my cases and advising the committee what I think.

Mr. FASCELL. Well, I don't want to give away your cases and I don't want to get into those cases, but we are presented with a very practical problem in this committee right now on drafting legislation. We are reserving the right of the Congress to act subsequently by joint resolution in meeting the Supreme Court decision. But, if that is going to fail because of the prohibition of that case as it applies to previously delegated authority, then it is an act of futility.

Mr. BRAND If that is correct, I would agree with you. I myself don't believe that the decision goes that far. The problem is that there are and might be in the future expansionists in the executive branch or elsewhere who will read portions or sentences or footnotes in this decision to argue for that proposition.

Because of just the way these cases get litigated, that may well be an issue in some future case. I don't suggest it is an open and shut question, but I do think that we ought to try to take the Supreme Court at their word. When they say we have to act bicamerally and offer presentment and if we do that, we are OK, then we should take them at their word and operate that way.

While we can all read the footnotes and debate about whether a particular view of the decision could be argued to expand it——

Mr. FASCELL. The problem with that, as I see it, is that we are handing them another case.

Mr. BRAND. We may be. We haven't heard from them yet.

Mr. FASCELL. I understand that, but I am not sure that I am prepared to take that risk right now, given the present predisposition of the Court in this case.

Mr. BRAND. That is certainly a very valid concern. I am not interested particularly in having anymore cases, either.

Mr. FASCELL. Me either.

Mr. BRAND. I think, as a matter of judgment, we want to stay out of the courts if we can.

Mr. SOLARZ. Will the gentleman yield?

Mr. FASCELL. Certainly.

Mr. SOLARZ. I thank the gentleman for yielding. I want to make sure I haven't missed something here.

My impression was that you had testified previously that with respect to arms sales it was your view that it would be clearly and presumptively constitutional for us to enact legislation which would provide that with respect to any arms sales above a certain threshold level, the President would have to notify the Congress of his intention to make such a sale and the Congress would then have to approve by joint resolution the sale itself.

Is there anything that you have said in response to the question by Mr. Fascell which would contradict what you said previously?

Mr. BRAND. No; only that knowing what we know about the people anxious to channalize the Congress into a box and turn them into a debating society with no real power to effect decisions outside the Congress, you must be careful about the future course that may be taken by those persons in challenging even that kind of system. Those are really two different concerns.

Mr. SOLARZ. Wait a minute. I am not sure if I understood what you were saying. I am addressing now only the constitutional aspects of the problem. I am not talking about the policy implications, whether it is wise for us to do this, whether or not the Congress should or should not spend time taking up these matters, whether our calendar will be clogged with joint resolutions authorizing the sale of bullets to Upper Volta and handgrenades to Chad, and the like. That is entirely separate. My own feeling is we can come up with a formula which would relieve us, in effect, of that burden and limit significantly the number of joint resolutions we would have to adopt.

I gather you are saying that such a procedure, a Presidential notification followed by the adoption of a joint resolution, is a condition for arms sales above a certain threshold and is, in light of this decision, presumptively and even clearly constitutional.

Mr. BRAND. I am saying that.

JOINT RESOLUTION MAY BE RECEIVED AS PLACING CONDITIONS ON AUTHORITY PREVIOUSLY DELEGATED

Mr. FASCELL. Excuse me. I would have to add something there because now I am confused. If the Organic Act gives the President

or he has the authority under the Constitution once the moneys are appropriated to make sales, is it possible for the Congress legislatively to put any condition on that sale, whether it is by joint resolution or not. That is the issue.

Mr. SOLARZ. What is your answer?

Mr. BRAND. I think you are framing the issue in the same way. I suppose my response is I would argue that a joint resolution of the kind you have described is constitutional, although I concede that there are those laying in wait to attack it with fillips from this decision to attack.

That is an institutional judgment the Congress has to make about which way it should proceed and is not necessarily a constitutional judgment.

CONGRESSIONAL AUTHORIZATION FOR EXECUTIVE TO SELL ARMS MAY INCLUDE REQUIREMENT FOR CONGRESSIONAL APPROVAL BY JOINT RESOLUTION

Mr. SOLARZ. Let me ask you this. Suppose we repealed all legislation involving arms sales? What would be the status of the right of the U.S. Government or the President to sell arms to other countries without any legislation at all?

Would he have a free hand?

Mr. BRAND. I think his argument would be that he is constitutionally empowered under Commander in Chief and other powers to do that.

Mr. SOLARZ. OK. So he has that authority to begin with.

Mr. BRAND. Well, he would argue that. I am not conceding that he does——

Mr. SOLARZ. Do you think he does?

Mr. BRAND. Not in the absence of an appropriation and authorizing statute or any other congressional anchor on which to base such sales.

Mr. FASCELL. Will the gentleman yield?

Mr. SOLARZ. Yes.

Mr. FASCELL. You have to carry it one step further, Steve, in this scenario, assuming that you have organic authorization, so that you have not only the question of the constitutional implied powers of the President or inherent powers, but express, organic, legislative authority, under which funds are subsequently appropriated.

Mr. SOLARZ. Right, but if the gentleman will yield further, is there any reason why we can't adopt legislation which provides the underlying organic legislative authority to the President to approve government-to-government arms sales? We are not talking about private sector sales. The Jones Artillery Manufacturing Co. in Florida can sell to whomever it wants, so long as it gets a license of approval or whatever.

But with respect to government-to-government sales, if we provide an underlying authorization to the executive branch to proceed with government-to-government sales, is there any reason why we can't build into that underlying authorization a requirement that no sales can go forward until two things happen: The President notifies the Congress of a desire to sell and the Congress approves it by joint resolution.

Your answer, I gather, is yes?

Mr. BRAND. Yes; with the qualification that an argument can be made by those on the other side. That is something that I concern myself with when I advise a committee because we don't litigate these things in a vacuum. We have an executive branch. Not only this President, but all Presidents who have taken a consistent position of trying to limit the ability of Congress to control these mechanisms.

CONGRESS MUST LIMIT AUTHORITY IN ORGANIC STATUTE TO RETAIN CONGRESSIONAL CONTROL

Mr. SOLARZ. If one were to accept the argument that is being hypothetically advanced by the gentleman from Florida, and presumably by the executive branch—that even this approach might be unconstitutional—if one were to accept that argument, would there be any constitutionally legitimate way in which the Congress could get a handle on arms sales?

Mr. BRAND. No; and that is why I said that doctrinally the decision reverses what the court held earlier in its history in the 1930's, that Congress can delegate by—the court hasn't reversed those cases and said it can't delegate it, but it has raised doubts about the ability of Congress to do that and retain any residuum of control or check.

Mr. SOLARZ. I cannot believe that the court has said that the Congress has no jurisdiction over arms sales whatsoever

Mr. FASCELL. No, the court has said, in my judgment—and this is just one man's opinion—that if you want to change that, you go back to the Organic Act. You just don't delegate the authority to start with.

Mr. SOLARZ. What would that mean in practical terms?

Mr. FASCELL. I don't know. Whatever it is, it covers arms sales.

Mr. SOLARZ. I mean, are you saying that if you went back to that Organic Act you could not put in the kind of procedure I described? You are saying you could put that procedure in.

Mr. FASCELL. No, you would have to limit, it seems to me, the authority in the Organic Act.

Mr. SOLARZ. Limit it to what?

Mr. FASCELL. Limit it to whatever you want to limit it to, specifically

Mr. SOLARZ. The question then becomes could you limit it in the way I have described by saying that the President's authority is limited by virtue of his obligation to notify the Congress and the willingness of the Congress to approve through the adoption of a joint resolution

Mr. BRAND. You could always amend the organic statute and change the standards under which you have made the delegation.

LIMITING EXECUTIVE AUTHORITY IN ORGANIC STATUTE WOULD REQUIRE PRESIDENT TO REQUEST SPECIFIC AUTHORITY

Mr. FASCELL One thought that occurs to me is that if you are going to do that, it would seem to me, at least cursorily, that the best thing to do would be not to write that provision into the statute.

The Congress always has the right to pass a law. The problem is the minute you say in the statute that the President can do so and so, except that he can't do this unless the Congress passes another law, you have created a problem.

If you say in the basic statute the President can't do this period, you force him to come up to the Congress and the Congress would then have to respond. You don't have to say it in the statute.

Mr SOLARZ. In other words, what you are saying, for argument's sake, is that with respect to arms sales above a certain threshold, no arms can be sold to any country above x million dollars?

Mr. FASCELL. That is the safest way to do it.

Mr. BRAND. He has to come up and ask for specific authority to—that gets back to what these things were originally envisioned as. They were a shortcut for the executive to come up and get around bicameral consideration and committee hearings and just allow the President to do it on his own unless Congress disapproved. This would reverse that process and force him to come up and have a bill passed.

Mr. SOLARZ. One of the features of any such effort would presumably be a procedure which would guarantee a vote on the floor of the House and the Senate, so that you couldn't simply bottle up such a proposal.

I assume that even if we went the route described by the gentleman from Florida, the rules of the House or the Senate could be amended to provide with respect to legislation concerning the sale of arms that you would have guaranteed votes.

QUESTION ON VALIDITY OF STATUTES WHICH WOULD SUBJECT EXECUTIVE AUTHORITY TO FURTHER CONGRESSIONAL ACTION

Mr. FASCELL. I think even with expedited procedures the problem still remains. He has a difficulty, because he is in the middle of ongoing cases. So, he can't really lay it out cold turkey here.

But the problem still remains that even with expedited procedure what you have done is set up in statute a condition upon the executive's authority, subject to further action of the Congress, notwithstanding that it is a constitutional presentment.

Mr. SOLARZ. I take the gentleman's point—it seems to me that it would serve the interests of the committee and the Congress to get a number of other legal judgments here. We may not have 100-percent certainty as to the ultimate judicial determination that would be made here, but if there is a clear consensus in the legal community that a particular approach is presumptively constitutional, I would think we are safe in going that route.

CONGRESSIONAL AUTHORITY REGARDING WAR POWERS AND ARMS SALES DIFFER

One final question. I gather from what you have said that you think that the procedure I have described with respect to arms sales is presumptively more constitutional than the existing procedure in the war powers resolution with respect to the need for a joint resolution authorizing the continued presence of American troops after the 60-day cutoff. This is because the war powers reso-

lution involves a potential or alleged infringement on the President's powers as Commander in Chief.

Mr. BRAND. Right.

Mr. SOLARZ. That raises separate questions, but those questions don't come up in the context of the Arms Export Control Act——

Mr. BRAND. Not in my view.

Mr. SOLARZ [continuing]. Because the President is Commander in Chief of the U.S. Armed Forces, not the Armed Forces of other countries.

Mr. BRAND. I see nothing in article II that says the President can sell arms to anybody. That is something he gets from the Congress. Just as there is nothing in article II which says the President can suspend deportation orders or the Attorney General can. That is something that has been given to him by legislative fiat.

Mr. SOLARZ. I thank the chairman for yielding.

Chairman ZABLOCKI. Mr. Fascell?

Mr. FASCELL. No, thank you, Mr. Chairman.

Chairman ZABLOCKI. Mr. Pritchard?

Mr. PRITCHARD. No, Mr Chairman.

Chairman ZABLOCKI. Mr. Leach?

Mr. LEACH No, thank you.

Chairman ZABLOCKI. Thank you, Mr. Brand. I can assure you we will have you before the committee again.

The committee stands adjourned until 10 tomorrow morning, when the witnesses will be the Honorable Edward C. Schmults, the Deputy Attorney General, Department of Justice, and the Honorable Kenneth W. Dam, Deputy Secretary of State, Department of State.

[Whereupon, at 11·55 a.m. the committee adjourned, to reconvene at 10:40 a.m., Wednesday, July 20, 1983.]

THE U.S. SUPREME COURT DECISION REGARDING THE LEGISLATIVE VETO

WEDNESDAY, JULY 20, 1983

HOUSE OF REPRESENTATIVES,
COMMITTEE ON FOREIGN AFFAIRS,
Washington, D.C.

The committee met at 10:40 a.m., in room 2172, Rayburn House Office Building, Hon. Clement J. Zablocki (chairman) presiding.

Chairman ZABLOCKI. The committee will please come to order.

This morning we meet to continue the hearings on the Supreme Court's decision concerning the legislative veto. Yesterday we heard from Mr. Stanley Brand, legal counsel to the House of Representatives. Today we are pleased to welcome officials from the administration, both the Justice and State Departments, to hear and learn how they plan to proceed in order to maintain a cooperative relationship with Congress on foreign policy matters. The focus of tomorrow's hearings will be on the legal ramifications of the Supreme Court decision as interpreted by two legal scholars.

Our witnesses today are the Honorable Edward C. Schmults, Deputy Attorney General, Department of Justice, and the Honorable Kenneth W. Dam, Deputy Secretary of State.

Gentlemen, we are very happy to have you and extend a warm welcome to you. We look forward to your testimony.

Mr. Schmults, we will begin with you. You may either read your statement or summarize it. In any case, the full statement will be included in the hearing record. Welcome to you both.

Mr. Schmults.

STATEMENT OF HON. EDWARD C. SCHMULTS, DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. SCHMULTS. Thank you, Mr. Chairman.

I appreciate the opportunity to appear before you today as a representative of the administration and the Department of Justice in connection with your effort to assess the impact of the recent decisions handed down by the Supreme Court holding legislative veto devices unconstitutional.

Before addressing those cases and the practical consequences of their impact on statutes containing legislative vetoes, particularly those of interest to this committee, I want to make two brief points that will, I hope, put the remarks that follow in their appropriate context. First, we believe that a large portion of the legal debate between Congress and the executive that has gone on with increasing intensity for 63 years, since President Woodrow Wilson vetoed

a bill containing such a device, has been resolved by the judicial branch, which is, of course, charged with deciding what the Constitution means. Thus, although some legal issues remain, which I will discuss in a minute or two, our purpose today should be to look forward rather than to reiterate the sincerely held and vigorously articulated views on the constitutional issue which now have been definitively addressed and adjudicated by the Supreme Court.

Second, the policy debate regarding Congress oversight over the executive's execution of the law, an important issue that so often became hopelessly entangled with the constitutional debate, may now proceed with both of our branches knowing, for the first time, the constitutional ground rules governing that debate. To the extent that certainty is a virtue in the law—and I believe it almost invariably is—both of our branches were benefited by the clarity and scope of the Supreme Court's decisions.

Turning to that policy debate, I would start by reiterating, with emphasis, a point consistently made by my predecessors and other representatives of the Department of Justice who have appeared over the years before various committees of Congress to discuss legislative vetoes: There are many effective and fully constitutional mechanisms whereby Congress can carry out its constitutional oversight function.

Because this committee in the chairman's letter to the Attorney General of July 7, 1983, has quite naturally indicated particular interest in the impact of the Supreme Court's decision in *Immigration and Naturalization Service* v. *Chadha* on statutes within this committee's jurisdiction, I will focus very generally on those statutes, virtually all of which implicate the conduct of this Nation's foreign affairs.

Before doing so, however, I would like to articulate for the committee what I believe to be a fundamental difference between the policy implications *Chadha* may be expected to have in the domestic area as contrasted with congressional oversight of our foreign relations and trade.

In the domestic area, much of the congressional impetus for enactment of legislative veto devices has found its origin in the belief that too many major policy decisions that are concededly within the province of Congress to make in the first instance have been delegated by Congress to the executive, only to be made by unelected officials who are not accountable in any direct sense to the electorate.

This problem has been perceived to be most acute with respect to the so-called independent regulatory commissions which, because they are not subject to direct Presidential control, have been viewed as a fourth branch of Government essentially beyond the control of either Congress or the President.

In the nondomestic areas of foreign affairs and trade, in contrast, political accountability, as I have just discussed, has not presented the same problem because the interest of Congress is usually directed toward oversight of relatively highly visible public actions taken by the President or his Cabinet officers. Because the Department of Justice has very little involvement in these areas outside the provision of legal counsel to those officials charged with that decisionmaking, I will make only two brief, related points First,

because virtually all executive decisions in this area implicate this Nation's foreign relations, they, and the statutory authorities implicated, must be viewed as involving the delicate interplay between the exercise of Congress legislative power and the exercise by the President of his inherent constitutional powers.

Second, because of this interplay of constitutional powers, great care must be taken in any restructuring of congressional oversight in this area to insure that the tools necessary for the President to conduct our foreign relations are not denied In this area, much more than in the domestic area, the need for flexibility in meeting the exigencies of any particular situation should remain paramount.

Turning now to the Supreme Court decisions themselves, I believe their thrust is captured most succinctly at that point in the Chief Justice's opinion, in which he defines that kind of legislative action that is subject to the requirements of the presentment clauses. In *Chadha,* he defined that action as action having "* * * the purpose and effect of altering the legal rights, duties and relations of persons, including * * * executive branch officials and (other persons) outside the legislative branch."

The sweep of this analysis, not unanticipated by this committee in 1982 and confirmed beyond any serious doubt by the court's summary affirmances on July 6, 1983, of the unanimous decisions of the United States Court of Appeals for the District of Columbia Circuit involving the phase II natural gas pricing rule and the Federal Trade Commission's used car rule, may well, in the words of Justice Powell in his concurring opinion in *Chadha,* "give * * * one pause." As I said at the outset, the clarity and breadth of the court's decisions provided certainty as regards the substantive constitutional issue and set the ground rules for an ongoing dialog on the question of congressional oversight of the executive's execution of the law.

Because the court's opinion speaks for itself, the outstanding legal questions, and therefore uncertainties, revolve around what we lawyers refer to as the severability issue. Let me use the three cases actually decided by the court to illustrate this issue.

In *Chadha,* the House and Senate had argued vigorously that if the one-house veto device were unconstitutional, then the statutory power of the Attorney General attached to the veto device—the power to suspend deportation of an otherwise deportable alien—should likewise fall because Congress would not have extended such power to the Attorney General without the legislative veto "string" attached.

In rejecting Congress argument on this issue, the court began its analysis by restating its prior view that "the invalid portions of a statute are to be severed * * * unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not." The court then relied on two distinct presumptions: First, the presumption that arose from the inclusion in the Immigration and Nationality Act of 1952 of a so-called severability clause; and second, the presumption the court identified based on the fact that the statutory scheme was, as a practical matter, fully operative once the unconstitutional provi-

sion was severed. In addition, the court found nothing in the legislative history of the 1952 act to rebut these presumptions.

In *Consumer Energy Council of America* v. *FERC,* the Court of Appeals was faced with deciding the severability of a one-house legislative veto device attached to rulemaking authority in a statute that did not contain a severability clause and a statute the legislative history of which arguably suggested nonseverability.

Notwithstanding the absence of a severability clause and the presence in the legislative history of the Natural Gas Policy Act of "contradictory comments" on one point, the Court of Appeals found the one-House veto mechanism to be severable, despite arguments of the House and Senate and other parties to the contrary.

Finally, *in Consumers Union Inc.* v. *FTC,* the issue of severability was not contested, largely because the two-House legislative veto involved was enacted separately from and subsequent to the underlying rulemaking authority as part of a statute specifically designed to secure judicial resolution of the constitutionality of that legislative veto device.

Because we anticipate that the issue of severability will arise or be introduced into litigation involving statutes containing legislative veto devices, I believe it would not be especially appropriate for me to delve too deeply or with any particularity into it at this time. I will say that we regard the Supreme Court's summary affirmance of the *Consumer Energy Council of America* v. *FERC* case as significant because if the court had wanted to reverse the apparent trend toward severability in the recent cases decided by the D.C. Circuit, it presumably would have used that case as a vehicle to do so.

Thus, as it has done with regard to the merits of the legislative veto issue, we believe that the court has injected considerable certainty into the severability issue, even though the issue will remain, as it always has been, one to be decided in otherwise appropriate cases on a statute-by-statute basis.

This committee has, of course, more than a passing acquaintance with this severability issue. In the course of its 1982 special study of the war powers resolution, the committee noted the presence of a severability clause in that legislation.

Simply stated, the Supreme Court's decision does not affect any of the procedural mechanisms contained in the war powers resolution other than that procedure specified in section 5(c), which purported to authorize Congress effectively to recall our troops from abroad by a resolution not presented to the President for his approval or disapproval.

In closing, I want to emphasize as strongly as possible that the executive branch will continue, as it has done in the past, to observe scrupulously the reporting and waiting features that are central to virtually all existing legislative veto devices. Although some minor adjustments by Congress to these provisions may prove desirable after we gain experience with their use absent their unconstitutional feature, we believe that experience under them—with the informal give and take they envision, as well as the opportunity for the enactment of legislation they provide—will be the soundest basis on which to proceed.

In reaction to *Chadha,* some Members of the House have suggested that the engine of government is broken and that there is an urgent need to fix it. I disagree. As the Chief Justice concluded in his opinion for the court:

> With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution

The engine is not broken. Whether it will need some oil here and there after *Chadha* is something that time and experience will demonstrate, but I believe the important thing is that we approach the post-*Chadha* era with the same spirit of comity and mutual respect that must characterize the relations between our two branches if we are to continue to realize the full potential in that truly unique document, the Constitution of the United States.

Mr. Chairman, once again I want to thank you and the committee for the opportunity to present our views on this important subject. I have attached to this statement a compilation of currently enacted legislative veto devices prepared since *Chadha* was decided by the Office of Legal Counsel of the Department of Justice. I hope this compilation will prove useful to this and other committees of Congress in the coming months.[1]

I will be happy, following Mr. Dam's testimony, to answer any questions you may have.

Chairman ZABLOCKI. Thank you very much, Mr. Schmults, for your testimony, as well as the compilation in a memorandum that was prepared for the Attorney General on the various pending issues related to the Supreme Court decision on the concurrent resolution approach. I am sure it will be very helpful. We will have some questions for you.

[Mr. Schmults' prepared statement follows:]

[1] The information referred to appears in app 1

PREPARED STATEMENT HON EDWARD C SCHMULTS, DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to appear before you today as a representative of the Administration and the Department of Justice in connection with your effort to assess the impact of the recent decisions handed down by the Supreme Court holding legislative veto devices unconstitutional.

Before addressing those cases and the practical consequences of their impact on statutes containing legislative vetoes, particularly those of interest to this Committee I want to make two brief points that will, I hope, put the remarks that follow in their appropriate context. First, we believe that a large portion of the legal debate between Congress and the Executive that has gone on with increasing intensity for 63 years since President Woodrow Wilson vetoed a bill containing such a device 1/ has been resolved by the Judicial Branch, which is of course charged with deciding what the Constitution means. Thus, although some legal issues remain which I will discuss generally below, our purpose today should be to look forward rather than to reiterate the sincerely held and vigorously articulated views on the constitutional issue which have now been definitively addressed and adjudicated by the Supreme Court.

1/ 59 Cong. Rec. 7026 (1920). Under that bill, the Congressional Joint Committee on Printing would have been empowered to control, through the issuance of regulations, the right of the Executive Branch to print information generated within the Executive Branch. President Wilson argued that once Congress had made an appropriation, it was to the Executive to administer that appropriation and that committees of Congress could not be empowered to share in that administration.

Second, the policy debate regarding Congress's oversight over the Executive's execution of the law, an important issue that so often became hopelessly entangled with the constitutional debate, may now proceed with both of our Branches knowing, for the first time, the constitutional ground rules governing that debate. To the extent that certainty is a virtue in the law, and I believe it almost invariably is, both of our Branches were benefitted by the clarity and scope of the Supreme Court's decisions.

Turning to that policy debate, I would start by reiterating, with emphasis, a point consistently made by my predecessors and other representatives of the Department of Justice who have appeared over the years before various Committees of Congress to discuss legislative vetoes: There are many effective and fully constitutional mechanisms whereby Congress can carry out its constitutional oversight function.

Because this Committee, in the Chairman's letter to the Attorney General of July 7, 1983, has quite naturally indicated particular interest in the impact of the Supreme Court's decision in Immigration and Naturalization Service v. Chadha 2/ on statutes within this Committee's jurisdiction, I will focus very generally on those statutes, virtually all of which implicate the conduct of this Nation's foreign affairs.

2/ No. 80-1832 (U.S. June 23, 1983).

Before doing so, however, I would like to articulate for the Committee what I believe to be a fundamental difference between the policy implications Chadha may be expected to have in the domestic area as contrasted with Congressional oversight of our foreign relations and trade.

In the domestic area, much of the Congressional impetus for enactment of legislative veto devices has found its origin in the belief that too many major policy decisions that are concededly within the province of Congress to make in the first instance have been delegated by Congress to the Executive, only to be made by unelected officials who are not "accountable" in any direct sense to the electorate. This problem has been perceived to be most acute with respect to the so-called "independent regulatory commissions" which, because they are not subject to direct Presidential control, have been viewed as a "fourth branch" of Government essentially beyond the control of either Congress or the President. 3/

In the non-domestic areas of foreign affairs and trade, in contrast, political accountability as discussed above has not presented the same problem because the interest of Congress

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3/ Process Gas Consumers Group v. Consumers Energy Council of America, Nos. 81-2008 et al. (U.S. July 6, 1983)(White, J., dissenting) slip op. at 5.

is usually directed towards oversight of relatively highly visible public actions taken by the President or his Cabinet officers. Because the Department of Justice has very little involvement in these areas outside the provision of legal counsel to those officials charged with that decisionmaking, I will make only two brief, related points. First, because virtually all Executive decisions in this area implicate this Nation's foreign relations, they -- and the statutory authorities implicated -- must be viewed as involving the delicate interplay between the exercise of Congress's legislative power and the exercise by the President of his inherent constitutional powers.

Second, because of this interplay of constitutional powers, great care must be taken in any restructuring of Congressional oversight in this area to ensure that the tools necessary for the President to conduct our foreign relations are not denied. In this area, much more than in the domestic area, the need for flexibility in meeting the exigencies of any particular situation should remain paramount.

Turning now to the Supreme Court decisions themselves, I believe their thrust is captured most succinctly at that point in the Chief Justice's opinion in which he defines that kind of "legislative action" that is subject to the requirements

of the Presentment Clauses. In Chadha, he defined that action as action having "the purpose and effect of altering the legal rights, duties and relations of persons, including . . . Executive Branch officials and [other persons] outside the legislative branch." 4/ The sweep of this analysis, not unanticipated by this Committee in 1982 5/ and confirmed beyond any serious doubt by the Court's summary affirmances on July 6, 1983 of the unanimous decisions of the United States Court of Appeals for the District of Columbia Circuit involving the "Phase II" natural gas pricing rule and the Federal Trade Commission's "used-car" rule, 6/ may well, in the words of Justice Powell in his concurring opinion in Chadha, "give . . . one pause." But, as I said at the outset, the clarity and breadth of the Court's decisions provide certaintly as regards the substantive constitutional issue and set the ground rules for an ongoing dialog on the question of Congressional oversight of the Executive's execution of the law.

4/ Immigration and Naturalization Service v. Chadha, No. 80-1832 (U.S. June 23, 1983) slip op. at 32.

5/ "The War Powers Resolution: A Special Study of the Committee on Foreign Affairs," House Committee on Foreign Affairs, 97th Cong., 2d Sess. 283 (1982)(comm. print).

6/ Process Gas Consumers Group v. Consumers Energy Council of America, Nos. 81-2008 et al. (U.S. July 6, 1973), aff'g Consumers Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982), and Consumers Union, Inc. v. FTC, 691 F.2d 575 (D.C. Cir. 1982).

Because the Court's opinion speaks for itself, the outstanding legal questions (and therefore uncertainties) revolve around what we lawyers refer to as the "severability" issue. Let me use the three cases actually decided by the Court to illustrate this issue.

In Chadha, the House and Senate had argued vigorously that if the one-House veto device were unconstitutional, then the statutory power of the Attorney General "attached" to the veto device -- the power to suspend deportation of an otherwise deportable alien -- should likewise fall because Congress would not have extended such power to the Attorney General without the legislative veto "string" attached.

In rejecting Congress's argument on this issue, the Court began its analysis by restating its prior view that "the invalid portions of a statute are to be severed '"[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not."' Buckley v. Valeo, 424 U.S. 1, 108 (1976), quoting Champlin Refining Co. v. Corporation Comm'n, 280 U.S. 210, 234 (1932)." Slip op. at 10-11. The Court then relied on two distinct presumptions; first, the presumption that arose from the inclusion in the Immigration and Nationality Act of 1952 of a so-called

"severability clause"; 7/ second, the presumption the Court identified based on the fact that the statutory scheme was, as a practical matter, "fully operative" once the unconstitutional provision was severed. 8/ In addition, the Court found nothing in the legislative history of the 1952 Act to rebut these presumptions. 9/

In Consumer Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982), the Court of Appeal was faced with deciding

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7/ Immigration and Naturalization Service v. Chadha, slip op. at 10-11. The severability clause, 8 U.S.C. § 1101, provides:

> "If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby."

(emphasis in opinion of the Court).

8/ Id. at 13. The Court found this "presumption" in its earlier decision in Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932). I note, however, that the Champlin decision did not specifically analyze the continuing operability of a statute after severance of its unconstitutional part as creating a "presumption" of severability. Thus Chadha should probably be viewed as having recognized a new "presumption" as regards severability.

9/ I note that Justice Rehnquist, joined by Justice White, dissented from the Court's holding and analysis of the legislative history, concluding that that history demonstrated "that Congress was unwilling to give the Executive Branch permission to suspend deportation on its own." Slip op. at 3 (Rehnquist, J., dissenting).

the severability of a one-House legislative veto device attached to rulemaking authority in a statute that did not contain a severability clause and a statute the legislative history of which arguably suggested non-severability. Notwithstanding the absence of a severability clause and the presence in the legislative history of the Natural Gas Policy Act of "contradictory comments" on point, the Court of Appeals found the one-House veto mechanism to be severable, 673 F.2d at 442, despite arguments of the House and Senate and other parties to the contrary.

Finally, in Consumers Union Inc. v. FTC, 691 F.2d 575 (D.C. Cir. 1982), the issue of severability was not contested, largely because the two-House legislative veto involved was enacted separately from, and subsequent to, the underlying rulemaking authority as part of a statute specifically designed to secure judicial resolution of the constitutionality of that legislative veto device.

Because we anticipate that the issue of severability will arise or be introduced into litigation involving statutes containing legislative veto devices, I believe it would not be especially appropriate for me to delve too deeply, or with any particularity, into it at this time. 10/ I will say that we regard

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10/ For example, on July 5, 1983 Exxon Corp. fixed a motion in the United States District Court here in Washing to be relieved (cont'd)

the Supreme Court's summary affirmance of the Consumer Energy Council of America v. FERC case as significant, because if the Court had wanted to reverse the apparent trend toward "severability" in the recent cases decided by the D.C. Circuit, 11/ it presumably would have used that case as a vehicle to do so. Thus, as it has done with regard to the merits of the legislative veto issue, we believe the Court has injected considerable

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(footnote cont'd)

from a $1.6 billion judgment entered by that court on June 7, 1983. Exxon's argument is essentially that the statutes under which the judgment was obtained, the Emergency Petroleum Allocation Act and the Energy Policy and Conservation Act, are invalid because they contain legislative veto mechanisms that are, Exxon alleges, inseverable from the remainder of those statutes. United States v. Exxon Corp., Civ. No. 78-1035 (D.D.C.).

In addition, federal employee unions have sued in that same court, arguing that the one-House veto provision in the federal statute governing federal workers pay, the Federal Pay Comparability Act of 1970, 5 U.S.C. §§ 5301 et seq., is unconstitutional and that the alternative pay plans submitted by the President in 1979, 1980 and 1982 were therefore invalid and full "comparability" raises are now due. AFGE, AFL-CIO v. Reagan, Civ. No. 83-1914 (D.D.C. filed July 5, 1983).

11/ Most recently in that Circuit a three-judge panel found severable an unconstitutional "committee approval" provision attached to the authority of the Department of Housing and Urban Development to spend appropriations for internal reogranizations that had not been "approved" by the House and Senate Committees on Appropriations. In that particular case, Congress had placed a prohibition on HUD's existing power to engage in internal reorganization but had permitted its appropriations committees in effect to waive that new statutory prohibition. The Court of Appeals struck down the prohibition as being inseverable from the "committee approval" device, thereby rendering this congressional checks on HUD's exercise of statutory power a total nullity. AFGE, AFL-CIO v. Pierce, No. 82-2372 (D.C. Cir. Dec. 8, 1982).

certainty into the "severability" issue even though the issue will remain, as it always has been, one to be decided in otherwise appropriate cases on a statute-by-statute basis.

This Committee has, of course, more than a passing acquaintance with this "severability" issue. In the course of its 1982 special study of the War Powers Resolution, note 5 supra, the Committee noted the presence of a severability clause in that legislation. 12/

Simply stated, the Supreme Court's decision does not affect any of the procedural mechanisms contained in the War Powers Resolution other than that procedure specified in § 5(c), which purported to authorize Congress effectively to recall our troops from abroad by a resolution not presented to the President for his approval or disapproval.

In closing, I want to emphasize as strongly as possible that the Executive Branch will continue, as it has done in the past, to observe scrupulously the "reporting" and "waiting" features that are central to virtually all existing legislative veto devices. Although some minor adjustments by Congress to these

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12/ Special Study, note 5 supra, at 283 n.9.

provisions may prove desirable after we gain experience with their use absent their unconstitutional feature, we believe that experience under them -- with the informal give-and-take they envision as well as the opportunity for the enactment of legislation they provide -- will be the soundest basis on which to proceed.

In reaction to Chadha, some Members of the House have suggested that the engine of Government is broken and that there is an urgent need to fix it. I disagree. As the Chief Justice concluded in his opinion for the Court:

> "With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution. 13/

The engine is not broken. Whether it will need some oil here and there after Chadha is something that time and experience will demonstrate, but I believe the important thing is that we approach the post-Chadha era with the same spirit of comity and mutual respect that must characterize the relations between our two Branches if we are to continue to realize the full potential in that truly unique document, the Constitution of the United States.

13/ Immigration and Naturalization Service v. Chadha, slip op. at 39.

Mr. Chairman, once again I want to thank you and the Committee for the opportunity to present our views on this important subject. I have attached to this statement a compilation of currently enacted legislative veto devices prepared since Chadha was decided by the Office of Legal Counsel of the Department of Justice. 14/ I hope this compilation will prove useful to this and other Committees of Congress in the coming months. I will endeavor as best I can to respond to any questions you may have.

14/ I note that this compilation does not include § 118(b) of Pub. L. No. 96-533, which provides that Congress may by joint resolution, authorize the President to provide certain kinds of assistance in Angola. Because joint resolutions are laws presented to the President, for his approval or disapproval, they do not constitute legislative veto devices. I note this because that provision was listed as a legislative veto provision in the enclosure to the Chairman's July 7, 1983 letter to the Attorney General.

Chairman ZABLOCKI. Now we will be very happy to hear from Mr. Dam.

STATEMENT OF HON. KENNETH W. DAM, DEPUTY SECRETARY, DEPARTMENT OF STATE

Mr. DAM. Thank you, Mr. Chairman.

In the interest of time I am going to skip over part of my testimony that describes the *Chadha* opinion. We have provided the full testimony to you for the record.

The Supreme Court's decision of June 23 in *INS* v. *Chadha,* as amplified by two summary decisions of July 6, has declared the long-standing practice of the legislative veto to be unconstitutional. This historic decision touches upon a considerable body of legislation in the field of foreign affairs and national security.

I welcome the opportunity to appear before this committee to present the preliminary views of the Department of State on some of the important questions raised by the *Chadha* decision.

At the outset I must emphasize that the views stated here are preliminary. While the Department of State has reached some tentative conclusions, we are still in the process of thoroughly reviewing all the legislation with which we deal and which is affected by *Chadha:* the language of the statutes, their legislative history, and the record of executive-legislative relations in working with these statutes.

This review is a task that cannot be accomplished overnight, as I am sure the committee will understand. We will keep the committee informed as we proceed toward firmer judgments about the legal environment created by the *Chadha* decision.

James Madison in The Federalist No. 47 referred to the separation of powers as "this essential precaution in favor of liberty." The genius of our constitutional system is that a structure of dispersed powers and checks and balances, designed to preserve our freedom, has also been able to function effectively to produce coherent national policy.

This success is a tribute not only to the Founding Fathers who built the structure, but also to the generations of leaders and statesmen since then who have put the Nation's well being first and foremost as they played their constitutional roles in the various branches of government.

As Justice White acknowledged in his dissent in *Chadha,* "the history of the separation of powers doctrine is also a history of accommodation and practicality." This is the spirit with which this administration approaches the task ahead of us.

The *Chadha* decision is consistent with the position of this administration and with the position taken by most administrations going back to that of Woodrow Wilson, who vetoed a bill incorporating a legislative veto in 1920.

Congress view has always been different. Nevertheless, the practice of executive-legislative relations need not undergo any immediate or radical change in the wake of the *Chadha* decision, for several reasons.

For one thing, *Chadha* does not affect other statutory procedures by which Congress is informed of or involved in actions by the ex-

ecutive branch. Specifically, *Chadha* does not affect statutory requirements for notifications, certifications, findings or reports to Congress, consultations with Congress, or waiting periods which give Congress an opportunity to act before executive actions take effect.

Moreover, in the foreign affairs field, the executive branch and the Congress have generally reconciled or disposed of controversies and differences without resort to the process of legislative veto. Therefore, we see no reason why the Court's decision should cause a fundamental change in our relationship.

We are prepared to work closely with the Congress to resolve any questions or problems that may arise as a result of the decision. We hope that Congress will act in the same spirit of cooperation.

Perhaps the key legal question raised by *Chadha* is that of severability. The problem is an intriguing one: since the legislative veto provision of a statute is unconstitutional, is any of the rest of the law tainted by that defect?

The Supreme Court has given us a basis for determining the answer to that question. As Deputy Attorney General Schmults just noted, the general principle is that the provision containing the legislative veto will be found to be severable, and the remainder of the statute will continue unaffected, unless it is evident that the legislature would not have enacted the remainder of the law without the legislative veto. That test establishes a very strong presumption in favor of severability.

The Supreme Court has also given us some additional guidelines. There is a further presumption of severability, first of all, if the statute contains an express severability clause. Several of the statutes with which we deal, including the war powers resolution and the Atomic Energy Act, for example, contain such severability clauses.

Second, the legislative veto is also presumed to be severable if the legislative program in question is fully operative as a law—that is the language of the court—without the veto provision.

In the statutes with which we are dealing, this seems generally to be the case. These statutes often establish a system under which the executive branch is empowered to make or implement a decision 30 or 60 days later unless the Congress chooses to intervene.

In foreign affairs cases to date, given the absence of formal congressional action, the executive determination has proceeded, although congressional views have always been taken fully into account. This pattern clearly indicates that these statutes are capable of independent operation with no further congressional action.

I would like to turn now to some of the most important statutes with which we deal in the foreign affairs area and to our probable response in light of the *Chadha* decision. One of the first that comes to mind is the war powers resolution.

The war powers resolution contains four major operative parts. The first of these is a consultation requirement.

In section 3 of the resolution, the President is required to consult with the Congress in every possible instance before U.S. Armed Forces are introduced into hostilities or into situations where imminent involvement in such hostilities is clearly indicated by the

circumstances. The President is to consult regularly while the forces remain in such situations.

The second operative part is a reporting requirement. In section 4, the President is required to make a formal report to Congress in any case in which U.S. Armed Forces are introduced:

(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;

(2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces, or

(3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation

The third operative part, section 5(b), requires the President to withdraw U.S. troops not later than 60 days after a report of actual or imminent involvement in hostilities unless the Congress has affirmatively authorized their continued presence.

The fourth operative part is a legislative veto. According to section 5(c), the President must withdraw U.S. troops introduced into hostilities even before the end of 60 days if the Congress so directs by concurrent resolution.

The first and second provisions of the war powers resolution on consultation and reporting are, in our view, unaffected by the *Chadha* decision. We do not intend to change our practice under them.

The fourth provision, which asserted a right of Congress by concurrent resolution to order the President to remove troops engaged in hostilities, is clearly unconstitutional under the Supreme Court's holding in *Chadha*. It seems to me unlikely, however, that this will have a significant impact on the conduct of national security policy.

In the decade since the enactment of the war powers resolution, no U.S. forces have been committed to long-term hostilities. It is doubtful that Presidents have refrained from such commitments because of the legislative veto in the war powers resolution.

It would be equally doubtful that Presidents will now feel freer of restraints because of *Chadha*. The lesson of recent history is that a President cannot sustain a major military involvement without congressional and public support.

We believe that the legislative veto provision of the war powers resolution is severable from the others according to the court's test and guidelines. The resolution itself includes a severability clause, and the other operative portions of the resolution need not be affected by the dropping of the veto provision.

The third operative part of the resolution, requiring positive congressional authorization after 60 days, does not fall within the scope of *Chadha*. Its constitutionality is neither affirmed, denied, nor even considered in the *Chadha* decision.

As you know, the executive branch has traditionally had questions about this requirement of congressional authorization for Presidential disposition of our Armed Forces, both in light of the President's Commander in Chief power and on practical grounds.

Congress, of course, has had a different view. I do not believe that any purpose would be served by debating these questions here,

in the abstract. This provision is unlikely to be tested in the near future.

I am authorized here and now to reaffirm the administration's strong commitment to the principles of consultation and reporting, confident that in a spirit of cooperation the executive and the Congress can meet future challenges together in the national interest.

We come next to the field of arms transfers. Under such statutes as the Arms Export Control Act, we have regularly reported to the Congress certain proposed foreign military sales. We have also reported the proposed licensing of arms exports to foreign countries sold through commercial channels.

Indeed, as a matter of practice and accommodation with the Congress, we have agreed with the Congress to go far beyond the statutory requirements. In addition to the statutory notification procedures, for example, we have long engaged in a practice of informal prenotification of proposed sales under the foreign military sales program.

While this is not required by law, it has given Congress the opportunity to review and comment upon proposed transactions informally and privately before the executive sends a formal public statement. This practice shows how much the executive branch has been aware of and responsive to the legitimate concerns of the Congress.

Even though we have long considered the legislative veto to be unconstitutional, we have always taken congressional concerns into account in formulating and carrying out the arms sales proposals.

While it seems clear that the legislative vetoes contained in several sections of the Arms Export Control Act are not valid, that result will in no way impair our continued reporting to Congress either under the express statutory provisions or under the informal prenotification and consultation that we have traditionally maintained; that is to say, we plan to follow both procedures.

In the last year alone, we have sent up more than 60 reports of intended arms sales and more than 30 prenotifications for non-NATO countries. While Congress has never disapproved any proposed arms sale, the administration has on occasion modified the terms of a proposal in light of congressional concerns.

I think that record speaks for itself. The executive branch does not live in a vacuum, and we are acutely aware of the need for consultation and cooperation in this sensitive area. The *Chadha* decision will make clearer the legal and political responsibility for these decisions, but it will not significantly alter the practice.

Another field in which statutes have contained many legislative veto provisions is that of international commerce in nuclear energy. Various sections of the Atomic Energy Act, for example, have provided for a legislative veto of Presidential determinations to permit nuclear exports to foreign countries.

There are three elements in many of the provisions. One of them is the establishment of very strict standards limiting the export of nuclear items. The second is an exceptional waiver authority, vested in the President, who may permit exports if he makes certain findings. The third is a congressional veto.

We consider that those standards and that waiver authority, as well as the statutory requirement of notification to Congress and the observance of a waiting period, continue to be valid.

We will continue to wait through the period during which the Congress, in the past, deliberated over its veto. During that time, the Congress may use its constitutional authority to enact new legislation if it chooses. The only provision that is invalid is the third, calling for a veto by concurrent resolution.

The administration shares Congress concern about nuclear proliferation. We have been active diplomatically in this field, as this committee knows. We vigorously oppose the development of nuclear weapons capabilities by additional countries.

Each executive branch agency is required to keep the Congress, including this committee, fully informed of its activities in this field and of significant developments abroad. We have done so, and we are proud of our record of close consultation and collaboration with the Congress. We will continue that practice.

A fourth important statutory area involving a legislative veto is the procedure for granting most-favored-nation treatment to certain nonmarket countries. Under the Jackson-Vanik amendment, nondiscriminatory tariff treatment may be granted to these countries only when they comply with certain conditions for the protection of human rights, including the right of emigration. These requirements may be waived on the basis of stated findings and determinations by the President.

The annual report required under that statute—for continuation of MFN for Hungary, Romania, and China—is now before the Ways and Means Committee. It can serve as an illustration of how we believe Congress and the executive branch should continue to work together constructively.

We presented that report to the Congress before the Supreme Court decision was announced. However, we would have done precisely the same thing if the *Chadha* decision had been handed down before the report was filed. We regard the report as fully effective to extend the waiver authority and to continue the waivers currently in force.

At the same time, legislative oversight hearings serve the salutary purpose of scrutinizing the implementation of statutory requirements, of airing public concerns, and of making our Nation's deep commitment to human rights known to other nations.

The spirit with which we expect to work with Congress in the future, in all statutory fields, is illustrated by another example. We are required by the Case-Zablocki act to report executive agreements to the Congress, and we do so regularly. That procedure notifies the Congress of agreements already signed.

There is also a procedure for enabling this committee and the Senate Foreign Relations Committee to consult with us as to the form of significant international agreements prior to their conclusion. This practice was arranged between the Department of State and the chairmen of the two committees in 1978. It is not required by law, but makes good sense. We will maintain it.

Where do we go from here? As I emphasized at the beginning, little of practical significance need in fact change as a result of the Supreme Court decision. The Department of State will continue to

work closely with the Members and committees of Congress and to take their concerns into account in reaching decisions on issues of policy. If anything, I believe *Chadha* will make the departments and agencies of the executive branch more, not less, conscious that they are accountable for their actions.

There are many basic questions about the separation of powers, particularly in the foreign affairs and national security field, which the Supreme Court will probably never settle.

In that realm, our constitutional law is determined, in a sense, as in Britain: By constitutional practice, by political realities, by the fundamental good sense and public conscience of the American people and their representatives. This is how we have always settled these questions, and this is how we, the Executive and the Congress, must approach these problems in the aftermath of *Chadha.*

Our Constitution is a wise and enduring blueprint for free government. In this period of our history, our Nation faces challenges that the drafters of that document could not have imagined.

One of the most profound responsibilities of the Federal Government is to conduct this Nation's foreign policy and insure its security in a nuclear age, in an era of instantaneous communications, in a complex modern world in which international politics has become truly global.

America's responsibility as a world leader imposes on us an obligation of coherence, vision, and constancy in the conduct of our foreign relations. For this there must be unity in our National Government.

The President and the Congress must work in harmony or our people will not have the effective, strong, and purposeful foreign policy which they expect and deserve. We have seen in the last 15 years that when Congress and the President are at loggerheads, the result can be stalemate and sometimes serious harm to our foreign policy.

We now have an opportunity, all of us, to put much of that past behind us and to start afresh. Let us shape a new era of harmony between the branches of our Government, an era of constructive and fruitful policymaking, an era of creativity and statesmanship. That is President Reagan's goal and the goal of all of us in his administration.

I thank you.

[Mr. Dam's prepared statement follows:]

PREPARED STATEMENT OF HON. KENNETH W DAM, DEPUTY SECRETARY OF STATE

Mr. Chairman and members of the Committee,

The Supreme Court's decision of June 23 in INS v. Chadha,* as amplified by two summary decisions of July 6,** has declared the long-standing practice of the legislative veto to be unconstitutional. This historic decision touches upon a considerable body of legislation in the field of foreign affairs and national security. I welcome the opportunity to appear before this Committee to present the preliminary views of the Department of State on some of the important questions raised by the Chadha decision.

At the outset I must emphasize that the views stated here are preliminary. While the Department of State has reached some tentative conclusions, we are still in the process of thoroughly reviewing all the legislation with which we deal and which is affected by Chadha--the language of the statutes, their legislative history, and the record of executive-legislative relations in working with these statutes.

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* Immigration and Naturalization Service v. Chadha, No. 80-1832 (U.S. June 23, 1983)

** Process Gas Consumers Group v. Consumers Energy Council of America, Nos. 81-2008 et al. (U.S. July 6, 1983), affirming Consumers Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982), and Consumers Union, Inc. v. FTC, 691 F.2d 575 (D.C. Cir. 1982).

This review is a task that cannot be accomplished overnight, as I am sure the Committee will understand. We will keep the Committee informed as we proceed toward firmer judgments about the legal environment created by the Chadha decision.

James Madison in The Federalist No. 47 referred to the separation of powers as "this essential precaution in favor of liberty." The genius of our constitutional system is that a structure of dispersed powers and checks and balances, designed to preserve our freedom, has also been able to function effectively to produce coherent national policy. This success is a tribute not only to the Founding Fathers who built the structure, but also to the generations of leaders and statesmen since then who have put the nation's well-being first and foremost as they played their constitutional roles in the various branches of government. As Justice White acknowledged in his dissent in Chadha, "the history of the separation of powers doctrine is also a history of accommodation and practicality."

This is the spirit with which this Administration approaches the task ahead of us.

I should like to examine first the history of the legislative veto--what it is, how it has worked--and then the Chadha decision itself and its consequences. Finally, I shall discuss the impact of that decision on some of the statutes that are of particular concern to the Department of State.

THE LEGISLATIVE VETO

"Legislative veto" is a term used to describe a variety of legislative devices designed to give Congress legal control over actions of executive departments and agencies by means other than the enactment of laws. The legislative veto has been included in statutes for more than 50 years. The procedure was first passed into law in the Act of June 30, 1932, which authorized President Hoover to reorganize the structure of the Federal Government subject to Congressional review. The device was added to various statutes during the Second World War, when the Congress delegated greater authority to the President in the area of foreign affairs and national security, subject to the legislative veto procedure. Enactment of the procedure became frequent again in the 1960's and 1970's, as Congress sought to strengthen its oversight over the expanding practice of rule-making by administrative agencies.

Adoption of the legislative veto procedure reached its zenith in the early 1970s, as a result or part of some major controversies in the area of foreign affairs and national security.

The statutes span a broad range. Many of them provide for Congressional disapproval of proposed administrative regulations. Some involve review of decisions of individual cases (Chadha, for example, involved the suspension of the deportation of a single person), or review of other executive actions under authority delegated by statute. Other legislation, such as the War Powers Resolution, involves the allocation of broad constitutional powers.

The legislative vetoes in all these statutes fall into two general categories. First, there are those in which the full Congress, or one House or one committee, is purportedly given a right to "veto" an administrative action. The typical statute of this kind requires the President to report an action or rule to both Houses of Congress. The executive action may not be made or take effect until after a fixed period (60 days, for example). If Congress does not act during the period, the executive action can take effect, but if the Congress disapproves (or one House or committee, as the statute may provide), it does not.

Second, there are statutory schemes by which an administrative action purportedly becomes valid only when approved by Congress. The typical statute of this kind requires the President to report a proposed action and then provides for affirmative approval by one or two Houses of the Congress. Most legislative vetoes, like the one in Chadha, fall within the first category.

THE CHADHA CASE AND ITS IMPLICATIONS

At issue in INS v. Chadha was a section of the Immigration and Nationality Act. That statute permitted the Attorney General to allow a deportable alien to remain in the United States, suspending an otherwise valid deportation order. This suspension authority, however, was subject to disapproval by a simple resolution of either House of Congress. The Attorney General suspended Chadha's deportation, but the House of Representatives disapproved. Chadha sued; the Supreme Court held the legislative veto to be unconstitutional. This holding was based on the rationale that legislative actions which do not follow the constitutionally prescribed course of approval by both Houses and "presentment" to the President cannot have legal effect. Thus the decision invalidates not only the "one-House veto" but the "two-House veto" and "committee veto" as well, a point confirmed by the Court's subsequent summary decisions of July 6.

Those statutes which provide for Congressional action by joint resolution--passed by both Houses and signed by the President--would not seem to be affected by Chadha.

The Chadha decision is consistent with the position of this Administration, and with the position taken by most administrations going back to that of Woodrow Wilson, who vetoed a bill incorporating a legislative veto in 1920. Congress's view has always been different. Nevertheless, the practice of executive-legislative relations need not undergo any immediate or radical change in the wake of the Chadha decision, for several reasons.

For one thing, Chadha does not affect other statutory procedures by which Congress is informed of or involved in actions by the Executive Branch. Specifically, Chadha does not affect statutory requirements for notifications, certifications, findings or reports to Congress, consultations with Congress, or waiting periods which give Congress an opportunity to act before executive actions take effect. Moreover, in the foreign affairs field, the Executive Branch and the Congress have generally reconciled or disposed of controversies and differences without resort to the process of legislative veto. Therefore, we see no reason why the Court's decision should cause a fundamental change in our relationship.

We are prepared to work closely with the Congress to resolve any questions or problems that may arise as a result of the decision. And we hope that Congress will act in the same spirit of cooperation.

Perhaps the key legal question raised by Chadha is that of "severability." The problem is an intriguing one: Since the legislative veto provision of a statute is unconstitutional, is any of the rest of the law tainted by that defect?

The Supreme Court has given us a basis for determining the answer to that question. The general principle is that the provision containing the legislative veto will be found to be severable, and the remainder of the statute will continue unaffected, unless it is evident that the legislature would not have enacted the remainder of the law without the legislative veto. That test establishes a strong presumption in favor of severability.

The Supreme Court has also given us some additional guidelines. There is a further presumption of severability, first of all, if the statute contains an express "severability clause." Several of the statutes with which we deal--including the War Powers Resolution and the Atomic Energy Act, for example--contain such severability clauses.

Second, the legislative veto is also presumed to be severable if the legislative program in question is "fully operative as a law" without the veto provision. In the statutes with which we are dealing, this seems generally to be the case. These statutes often establish a system under which the Executive Branch is empowered to make or implement a decision 30 or 60 days later unless the Congress chooses to intervene. In foreign affairs cases to date, given the absence of formal Congressional action, the executive determination has proceeded, although Congressional views have always been taken fully into account. This pattern clearly indicates that these statutes are capable of independent operation with no further Congressional action.

SPECIFIC CASES

I would like to turn now to some of the most important statutes with which we deal in the foreign affairs area and to our probable response in light of the Chadha decision. One of the first that comes to mind is the War Powers Resolution.

War Powers Resolution. The War Powers Resolution contains four major operative parts. The first of these is a consultation requirement.

In Section 3 of the Resolution, the President is required to consult with the Congress "in every possible instance" before United States armed forces are introduced into hostilities or into situations where imminent involvement in such hostilities is clearly indicated by the circumstances. And the President is to consult regularly while the forces remain in such situations.

The second operative part is a reporting requirement. In Section 4, the President is required to make a formal report to Congress in any case in which United States armed forces are introduced--

> "(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;
>
> "(2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or
>
> "(3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation...."

The third operative part, Section 5(b), requires the President to withdraw U.S. troops not later than 60 days after a report of actual or imminent involvement in hostilities unless the Congress has affirmatively authorized their continued presence.

The fourth operative part is a legislative veto. According to Section 5(c), the President must withdraw U.S. troops introduced into hostilities even before the end of 60 days if the Congress so directs by concurrent resolution.

The first and second provisions of the War Powers Resolution, on consultation and reporting, are in our view unaffected by the Chadha decision. We do not intend to change our practice under them.

The fourth provision, which asserted a right of Congress by concurrent resolution to order the President to remove troops engaged in hostilities, is clearly unconstitutional under the Supreme Court's holding in Chadha. It seems to me unlikely, however, that this will have a significant impact on the conduct of national security policy. In the decade since the enactment of the War Powers Resolution, no U.S. forces have been committed to long-term hostilities. It is doubtful that Presidents have refrained from such commitments because of the legislative veto in the War Powers Resolution.

It would be equally doubtful that Presidents will now feel freer of restraints because of Chadha. The lesson of recent history is that a President cannot sustain a major military involvement without Congressional and public support.

We believe the legislative veto provision of the War Powers Resolution is severable from the others according to the Court's test and guidelines. The Resolution itself includes a severability clause, and the other operative portions of the Resolution need not be affected by the dropping of the veto provision.

The third operative part of the Resolution, requiring positive Congressional authorization after 60 days, does not fall within the scope of Chadha. Its constitutionality is neither affirmed, denied, nor even considered in the Chadha decision. As you know, the Executive Branch has traditionally had questions about this requirement of Congressional authorization for Presidential disposition of our armed forces, both in light of the President's Commander-in-Chief power and on practical grounds. Congress, of course, has had a different view. I do not believe that any purpose would be served by debating these questions here, in the abstract. This provision is unlikely to be tested in the near future.

And I am authorized here and now to reaffirm the Administration's strong commitment to the principles of consultation and reporting, confident that in a spirit of cooperation the Executive and the Congress can meet future challenges together in the national interest.

Arms Export Control. We come next to the field of arms transfers. Under such statutes as the Arms Export Control Act, we have regularly reported to the Congress certain proposed foreign military sales. We have also reported the proposed licensing of arms exports to foreign countries sold through commercial channels.

Indeed, as a matter of practice and accommodation with the Congress, we have agreed with the Congress to go far beyond the statutory requirements. In addition to the statutory notification procedures, for example, we have long engaged in a practice of informal pre-notification of proposed sales under the Foreign Military Sales program. While this is not required by law, it has given Congress the opportunity to review and comment upon proposed transactions informally and privately before the Executive sends a formal public statement. This practice shows how much the Executive Branch has been aware of and responsive to the legitimate concerns of the Congress.

Even though we have long considered the legislative veto to be unconstitutional, we have always taken Congressional concerns into account in formulating and carrying out the arms sales proposals.

While it seems clear that the legislative vetoes contained in several sections of the Arms Export Control Act are not reporting to Congress either under the express statutory provisions or under the informal pre-notification and consultation that we have traditionally maintained. In the last year alone, we have sent up more than 60 reports of intended arms sales and more than 30 pre-notifications for non-NATO countries. While Congress has never disapproved any proposed arms sale, the Administration has on occasion modified the terms of a proposal in light of Congressional concerns.

I think that record speaks for itself. The Executive Branch does not live in a vacuum, and we are acutely aware of the need for consultation and cooperation in this sensitive area. The Chadha decision will make clearer the legal and political responsibility for these decisions, but it will not significantly affect the practice.

Nuclear Non-Proliferation. Another field in which statutes have contained many legislative veto provisions is that of international commerce in nuclear energy. Various sections of the Atomic Energy Act, for example, have provided for a legislative veto of Presidential determinations to permit nuclear exports to foreign countries.

of them is the establishment of very strict standards limiting the export of nuclear items. The second is an exceptional waiver authority, vested in the President, who may permit exports if he makes certain findings. The third is a Congressional veto. We consider that those standards and that waiver authority, as well as the statutory requirement of notification to Congress and the observance of a waiting period, continue to be valid. We will continue to wait through the period during which the Congress, in the past, deliberated over its veto; during that time, the Congress may use its constitutional authority to enact new legislation if it chooses. The only provision that is invalid is the third, calling for a veto by concurrent resolution.

The Administration shares Congress's concern about nuclear proliferation. We have been active diplomatically in this field, as this Committee knows.

We vigorously oppose the development of nuclear weapons capabilities by additional countries. Each Executive Branch agency is required to keep the Congress, including this Committee, fully informed of its activities in this field and of significant developments abroad. We have done so, and we are proud of our record of close consultation and collaboration with the Congress. We will continue that practice.

Jackson-Vanik Amendment and Trade-Related Issues. A fourth important statutory area involving a legislative veto is the procedure for granting most-favored-nation treatment (MFN) to certain non-market countries. Under the Jackson-Vanik Amendment, nondiscriminatory tariff treatment may be granted to these countries only when they comply with certain conditions for the protection of human rights, including the right of emigration. These requirements may be waived on the basis of stated findings and determinations by the President.

The annual report required under that statute--for continuation of MFN for Hungary, Romania, and China--is now before the Ways and Means Committee. It can serve as an illustration of how we believe Congress and the Executive should continue to work together constructively.

We presented that report to the Congress before the Supreme Court decision was announced.

However, we would have done precisely the same thing if the Chadha decision had been handed down before the report was filed. We regard the report as fully effective to extend the waiver authority and to continue the waivers currently in force. At the same time, legislative oversight hearings serve the salutary purpose of scrutinizing the implementation of statutory requirements, of airing public concerns, and of making our nation's deep commitment to human rights known to other nations.

The spirit with which we expect to work with Congress in the future, in all statutory fields, is illustrated by another example. We are required by the Case-Zablocki Act to report executive agreements to the Congress, and we do so regularly. That procedure notifies the Congress of agreements already signed. There is also a procedure for enabling this Committee and the Senate Foreign Relations Committee to consult with us as to the form of significant international agreements prior to their conclusion. This practice was arranged between the Department of State and the Chairmen of the two Committees in 1978. It is not required by law, but makes good sense. We will maintain it.

WHERE DO WE GO FROM HERE?

As I emphasized at the beginning, little of practical significance need in fact change as a result of the Supreme Court decision. The Department of State will continue to work closely with the members and committees of Congress and to take their concerns into account in reaching decisions on issues of policy. If anything, I believe Chadha will make the departments and agencies of the Executive Branch more, not less, conscious that they are accountable for their actions.

There are many basic questions about the separation of powers, particularly in the foreign affairs and national security field, which the Supreme Court will probably never settle. In that realm our constitutional law is determined, in a sense, as in Britain--by constitutional practice, by political realities, by the fundamental good sense and public conscience of the American people and their representatives. This is how we have always settled these questions, and this is how we, the Executive and the Congress, must approach these problems in the aftermath of Chadha.

Our Constitution is a wise and enduring blueprint for free government. In this period of our history, our nation faces challenges that the drafters of that document could not have imagined.

One of the most profound responsibilities of the federal government is to conduct this nation's foreign policy and ensure its security in a nuclear age, in an era of instantaneous communications, in a complex modern world in which international politics has become truly global. America's responsibility as a world leader imposes on us an obligation of coherence, vision, and constancy in the conduct of our foreign relations. For this there must be unity in our national government. The President and the Congress must work in harmony, or our people will not have the effective, strong, and purposeful foreign policy which they expect and deserve. We have seen in the last 15 years that when Congress and the President are at loggerheads, the result can be stalemate and sometimes serious harm to our foreign policy.

We now have an opportunity, all of us, to put much of that past behind us, and to start afresh. Let us shape a new era of harmony between the branches of our government--an era of constructive and fruitful policymaking, an era of creativity and statesmanship. That is President Reagan's goal and the goal of all of us in his Administration.

Thank you.

Mr. SOLARZ [presiding]. Thank you very much, Mr. Dam.

Mr. Winn, would you like to lead off the questioning?

Mr. WINN. Thank you, Mr. Chairman.

First, I want to congratulate and compliment both of you for a very, very fine statement. Even some of us that are not lawyers, Mr. Schmults, could understand basically what you were driving at.

I want to congratulate the Department of Justice for printing their report, your testimony, on both sides of the pages.

Mr. SCHMULTS. Thank you.

IMPACT OF "CHADHA" DECISION ON ABILITY OF ARMS CONTRACTORS TO BRING SUIT

Mr. WINN. House Counsel Stanley Brand testified yesterday that the *Chadha* decision could mean that private litigants will have the standing to disrupt arms export decisions. Mr. Brand suggested that following the court's decision, if the Congress expressed its disapproval of a proposed arms sale, and that action influenced the President not to permit that sale, then a contractor who lost that sale could bring suit under the theory that he has been harmed by what could be considered an unconstitutional accommodation between the two branches.

I would like to have particularly Mr. Schmults' theory on the assessment of that theory, and Mr. Dam, too, if you care to comment.

Mr. SCHMULTS. I have not seen Mr. Brand's testimony. I see that a statement to that effect was included in the summary that I received earlier this morning.

I must say, first of all, the questions of standing are not easy ones to resolve in the abstract. I must also add that I have considerable doubt in the situation you have just posed whether, in fact, the arms contractor would have standing. Indeed, I think the arms contractor probably would not have standing.

It seems to me that in this area, if the President chooses, as Mr. Dam has said that he will do, to consult with the Congress by following the reporting and waiting provisions in the arms sale laws, and that the President may well consider and take into account Congress advice on this issue and make his decision, in part, on that, I really don't think that that situation will give rise to any standing by arms contractors. I certainly would hope that it would not.

Mr. WINN. I hope that it would not, too, but I truthfully wouldn't be a bit surprised that some very, very disappointed, disgruntled contractor might choose to bring a suit of that type.

I wondered if there are any suggestions that you might have where we could get a clarification of that, or the question that that brings up could be clarified prior to any possibility of a suit being filed like that?

Mr. SCHMULTS. We can certainly consider that question. Anyone can bring a lawsuit. I think the question is are they going to be able to maintain it. I would think that an arms contractor would not have standing in that situation.

We can consider that further, if you wish, and sort of reflect on that and give a more considered view, but certainly my reaction,

which is all I can give you today, is that there would not be be standing in that case.

Mr. WINN. I appreciate your reaction to it today. It starts on page 12 and runs over to page 13 of Mr. Brand's testimony yesterday. If you don't have it, the committee staff will be glad to furnish you a copy of his testimony before the committee.

Mr. SCHMULTS. Thank you. I will get that, and we will discuss that with Mr. Brand.

Mr. WINN. I think it might be wise to furnish a little further opinion to the committee, if you could, because obviously this is a question that has come up already.

Mr. SCHMULTS. Fine. We will do that, sir.

[The information requested, together with an additional response to a similar inquiry follows:]

U S Department of Justice
Office of the Deputy Attorney General

The Deputy Attorney General

Washington D C 20530

August 16, 1983

Honorable Clement R. Zablocki
Chairman, Committee on Foreign Affairs
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

The purpose of this letter is to transmit to the Committee the transcript of my testimony before the Committee on July 20, 1983, regarding the Supreme Court's decision, INS v. Chadha, No. 80-1832 (U.S. June 23, 1983), holding legislative veto devices unconstitutional, and to respond to a question asked by a member of the Committee during my testimony related to potential litigation involving proposed arms sales (transcript at pp. 28, 41).

During the hearing, Representative Winn made reference to testimony presented to the Committee on July 19, 1983 by Mr. Brand, the General Counsel to the Clerk, House of Representatives. Mr. Wynn apparently made reference to material found on pages 12 and 14 of Mr. Brand's prepared statement in which Mr. Brand seemed to assume the following hypothetical situation:

> The President would transmit to Congress a proposed arms sale; Congress would pass a concurrent resolution disapproving that sale; and the President would thereafter determine either "to formally abide" by such a concurrent resolution or "to informally abide" by that resolution by refusing to approve finally the particular arms sale involved.

Mr. Brand's prepared statement goes on to suggest that the "disappointed defense contractor" would be able to challenge successfully in court what he refers to as this "unconstitutional accommodation between the branches . . ." (Mr. Brand's statement at 13).

Since the question is hypothetical and assumes an entirely speculative set of facts, it is difficult to offer a definitive constitutional analysis to Mr. Brand's scenario. However, for reasons set forth briefly at pp. 41-42 of the transcript of the July 20 hearing, I believe that the legal challenge contemplated in Mr. Brand's prepared statement would not be well founded. Initially, it is difficult to comprehend how the accommodation between the Executive and Legislative Branches as described in Mr. Brand's hypothetical situation could be regarded as "unconstitutional." Indeed, Mr. Brand's suggestion that it could be regarded as "unconstitutional" would draw into question the execution by the Executive of innumerable statutes under which the Executive routinely consults with, and seeks the advice of, Congress, its committees, subcomittees, and individual Members, in connection with specific decisions. I believe the lack of merit of such a suggestion is self-evident.

Second, even assuming, as does Mr. Brand, that a private defense contractor would have "standing" in the constitutional sense, in that his business would have suffered measurable injury based on the President's ultimate decision not to permit that contractor to consummate the sale of arms involved, Mr. Brand also seems to assume that the relevant arms sale statute would be interpreted by the courts to confer a statutory right of action on the defense contractor, an assumption which might well be invalid. In addition, Mr. Brand appears to assume that the federal courts would hold that the issue that would be presented to them for decision by the defense contractor -- whether the defense contractor was denied any statutory or constitutional rights because the President determined not to permit the sale of arms after taking into consideration the strong views of Congress in opposition -- would be otherwise justiciable. That assumption, like Mr. Brand's other assumptions, would appear to be questionable. */

I would like to extend my very sincere appreciation for the many courtesies shown to me during my testimony before the Committee on Foreign Affairs.

Sincerely,

Edward C. Schmults
Deputy Attorney General

*/ Although the question was not raised at the hearing, in his prepared statement Mr. Brand suggests that counsel representing Congress, rather than this Department, would defend such litigation. (Mr. Brand's statement at p. 14). I can perceive no reason why the Department of Justice would not and could not defend against such a law suit.

U S Department of Justice
Office of the Deputy Attorney General

The Deputy Attorney General

Washington D C 20530

August 16, 1983

Honorable Sam B. Hall
Chairman, Subcommittee on
Administrative Law and Governmental
Relations
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

The purpose of this letter is to transmit to you the transcript of my testimony before your subcommittee on July 18, 1983, regarding the decision of the Supreme Court in INS v. Chadha, No. 80-1832 (U.S. June 23, 1983), and to respond to two questions asked by members of the Subcommittee during my testimony.

During my testimony, Representative Frank asked whether the sale of certain arms to the Taiwanese government, which Mr. Frank had read about in that morning's newspaper, was subject to a "legislative veto" device. The Department of State has confirmed that this particular sale, involving approximately $530 million in arms, would have been subject to the provisions of § 36(b) of the Arms Export Control Act, 22 U.S.C. § 2776(b). The Department of State will, of course, observe the relevant waiting periods before that sale is finally consumated.

Representative Berman asked whether the Administration views the legislative veto devices found in the International Security Assistance and Arms Control Act of 1976 and the International Security Assistance Act of 1977 as severable from the substantive powers granted in those two particular statutes. This Department does regard the legislative veto devices in those two statutes as severable; their severability was discussed in Deputy Secretary of State Dam's testimony before the House Committee on Foreign Affairs on July 20, 1983, a copy of which is attached for the Subcommittee.

We trust that the information above will be helpful to the Subcommittee, and I would like to express my sincere appreciation for the courtesy shown to me by the Subcommittee on July 18.

Sincerely,

Edward C. Schmults
Deputy Attorney General

Mr. WINN. Mr. Dam, do you have any comment on that?

Mr. DAM. I just have two comments. One is that the person not only has to have standing, which seems, for the reasons stated, extremely doubtful, but also has to win the lawsuit. It seems to me what is important is whether the President complies with the statute.

The President, in the conduct of foreign relations, can undoubtedly change his mind, as long as he doesn't transgress any of the waiting periods and that kind of thing. So I don't really see that even if standing were there, there would be much of a chance of anybody ever prevailing. In any event, I agree that it is useful to look at the standing question carefully.

Mr. WINN. I like what you said in your testimony. I think it is good and is solid and is strong. You and I trust the President to do exactly what is called for in these agreements. But as you know, having sat through some of these hearings, there are other members of this committee who don't exactly trust the President to do or they are wondering what he is doing, and that is understandable, because of political differences or differences in philosophy.

I don't believe I have any more questions, Mr. Chairman. Thank you very much.

Mr. SOLARZ. Thank you, Mr. Winn.

Chairman ZABLOCKI [presiding]. The gentleman from New York is recognized.

VALIDITY OF JOINT RESOLUTION OF APPROVAL NOT AFFECTED BY "CHADHA" DECISION

Mr. SOLARZ. Mr. Dam, I gather it is the view of the department that a procedure in which, for example, the President is permitted to issue a waiver but where the effectuation of that waiver is then contingent on the adoption of a joint resolution by the Congress is presumptively constitutional?

Let me give you a specific example of what I have in mind. Take, for example, the Arms Export Control Act, with respect to which the legislative veto has now been presumptively declared unconstitutional.

What would be the view of the department with respect to the constitutionality of the following kind of arrangement, an arrangement in which with respect to arms sales above a certain threshold the President, if he wanted to sell arms to such a country, would be obligated to notify the Congress and the Congress would then have to adopt a joint resolution approving the notification in order for the sale to go forward.

Of course, that joint resolution could then be vetoed by the President, but since the President would be approving something he wanted to do in the initial instance, that would obviously never happen.

Assuming that what we were talking about was a joint resolution approving the President's notification of his desire to proceed with the arms sale in question, rather than a concurrent resolution, would you consider it acceptable? This is from a constitutional point of view, now. I am not speaking to the question of policy, but purely from a constitutional point of view.

Mr. DAM. From a constitutional point of view, it seems to me *Chadha* doesn't have anything to say about it because *Chadha* had to do with concurrent resolutions. It doesn't transgress, so far as I can see, the presentment clause. You have the bicameral clause met, so I don't see that there is anything in *Chadha* that would bear on it.

Mr. SOLARZ. Given the fact that there is nothing in *Chadha* that bears on it, do you have any other views you would want to express on it unrelated to *Chadha?* At this point would you challenge the constitutionality of such an approach or not?

Mr. DAM. Of course, I would be guided by the Department of Justice, but for the moment I don't see any constitutional problems.

Mr. SOLARZ. Do you see any, Mr. Schmults, with that approach?

Mr. SCHMULTS. No. If I understand what you have said, no, I don't think the question of a joint resolution which, after all, can be called a law, would pose any problems under *Chadha* at all.

OPTIONS TO INSURE CONGRESSIONAL PARTICIPATION IN ARMS SALES DECISIONS

Mr. SOLARZ. From the point of view of those of us on the Hill who think that there has to be some institutionalization of congressional participation in these arms sales decisions, it seems to me we have one of two ways of approaching it. I would be interested, from your perspective, in terms of the policy implications of each approach, where you would come out.

One approach would be to take arms sales above a certain level. Let's just hypothetically say the existing level, say $50 million, and say that any arms sale over $50 million would require the adoption of a joint resolution approving the sale after the President had notified the Congress. You might possibly exempt certain countries, like the NATO countries, some of the other democracies in the world.

Another approach would be to say that in order for any arms sale over a certain amount, or any arms sale at all to take place, but particularly over a certain amount, Congress would have to enact legislation authorizing the sale, as distinguished from a joint resolution. In other words, you would, in effect prohibit future arms sales above a certain level but reserving for Congress the right to enact legislation authorizing the sale.

From your point of view, would you see any merit to one approach vis-a-vis the other, or would it be six of one, half a dozen of another?

EXECUTIVE SEES ADVANTAGE IN JOINT RESOLUTION OF APPROVAL OVER ENACTMENT OF AUTHORIZING LEGISLATION REGARDING ARMS SALES

Mr. DAM. I don't know what the implications would be with regard to procedures of the Congress and jurisdiction and so forth of committees.

From our point of view, from a policy point of view in the Department of State, I think there are certain advantages to the notification followed by a joint resolution. I say that only because it permits the Executive to at least propose an agenda. Actually, we

could propose an agenda anyway, but this does it in a more formal way.

Mr. SOLARZ. I appreciate your responsiveness to that question. In the interest of institutional amity and comity, would you be prepared at this time, Mr. Secretary, to endorse that approach to the problems created by the *Chadha* decision?

Mr. DAM. As I said, there are two reservations I have expressed. I don't see any conceivable constitutional problem, but I would have to make sure that there is not something I haven't thought of. I don't think it has to do with *Chadha.*

Second, I don't know what the implications may be in terms of procedural timetables and things of that character. I haven't had a chance to study it. On the face of it, as a general principle, it seems to me quite acceptable as an approach, but if there is to be such legislation, I am essentially choosing between two things, neither of which I like from a policy point of view; that is, assuming that arms sales are going to be a regular legislative matter, taking up, as they will, particularly if you have low ceilings, a very large portion of committee and congressional time.

LEGISLATIVE PROCEDURES AVAILABLE TO HANDLE ARMS SALES REQUESTS ON EXPEDITED BASIS

Mr. SOLARZ. Let me say that I think that problem, which is a legitimate one, can be dealt with. It can be dealt with in a variety of ways.

First of all, we can provide for expedited procedures in order to make sure that such Presidential requests are brought up for a vote in both the House and the Senate, so you don't have to worry about committees sitting on them indefinitely.

Second, most of these requests, as you know, are noncontroversial. There is no reason that the great majority of them couldn't even be handled within the context of omnibus resolutions, in the same way the Senate, in the discharge of its confirmation responsibilities, often approves en bloc thousands of military appointments or several ambassadorial appointments at the same time.

It seems to me that these procedural problems—our being continuously occupied with authorizing arms sales or our not being able to take these matters up in a timely fashion, thereby impairing the national interests—are all problems that can be dealt with.

POTENTIAL PROBLEMS ARISING FROM FLOOR CONSIDERATION OF ARMS SALES REQUESTS

Mr. DAM. I would like to respond to that, if I could. First of all, there were almost 70 cases, over $200 million, in the fiscal year 1979–80 period, which were about 17 a year, and sometimes got as high as 25.

It is true one can have expedited procedures, but still I think one is going to run into the problem one often runs into; that is, that time on the floor is scarce. Perhaps there are more problems in the Senate than the House. I don't know about that. But often, as one gets near the end of a term or near a recess, things can only go forward essentially by consent.

In the arms sale area, since we are dealing with individual countries, and therefore we are dealing with individual constituencies in the United States, there are likely to be situations in which a number of these sales are going to be controversial with one or another group, even though the opponents don't command anywhere near a majority.

The question is, is it practical, is it efficient, does it contribute to the foreign policy of the United States to create that kind of a series of essentially irrelevant roadblocks—irrelevant because they are procedural—to carrying out the foreign policy of the United States.

Mr. SOLARZ. This is a subject, of course, the committee will want to debate. I would simply say that whatever problems are created by the kind of procedural difficulties you have outlined, almost all of which I think can be met by carefully drafted legislation, they hardly compare to what seems to me to be the overriding national interest in providing the Congress with some meaningful form of control over what might otherwise be the unlimited and unrestrained sale of arms. This is particularly with respect to sales to countries where there are many people in the Congress and the country who don't think it is in our interest to sell arms. I think that we have to strike a balance here.

CONGRESSIONAL PARTICIPATION IN ARMS SALES INSURED THROUGH APPROPRIATIONS PROCESS

Mr. DAM. With the chairman's permission, it might be useful if I were just to respond very briefly to that. It seems to me if you are going to talk about a joint resolution and if you have waiting periods which are reasonable, which correspond to the kind of period you were thinking about anyway, then it seems to me Congress has the power to prohibit a transaction if it has not yet taken place. Congress does have an effective voice. In any event, especially when we go to FMS sales and so forth, Congress has the power of the purse.

Finally, I think it is unlikely that any administration is going to want to flout the wishes of a majority of the Congress or a majority of this committee. In fact it will affirmatively want to come to an accommodation with any significant group that has a well-founded objection to any particular transaction.

ADMINISTRATION'S POSITION ON ARMS SALES NOT ALWAYS INFLUENCED BY CONGRESSIONAL OPPOSITION

Mr. SOLARZ. I can only say, Mr. Secretary, if that had been true, the AWACS never would have been sold to Saudi Arabia. There was obviously substantial opposition, including three-quarters of the House of Representatives, but ultimately those of us who were opposed weren't able to muster a majority in the Senate, so the sale went forward.

The administration's own track record has demonstrated that while it does pay attention to congressional views, it has not been prepared to drop sales it wants to proceed with simply because of even significant opposition in the Congress.

Mr. DAM. That is really just 1 of about 70 large sales where we even had that kind of difficulty.

Chairman ZABLOCKI. If I might just comment on the remark of my colleague from New York, Congress is not infallible.

Mr. Lagomarsino?

CONGRESSIONAL VETO BY JOINT RESOLUTION NOT AFFECTED BY "CHADHA" DECISION

Mr. LAGOMARSINO. Thank you, Mr. Chairman.

Gentlemen, I want to commend both of you for your statements and for your spirit of cooperation. Most of the questions I had in mind have already been asked and answered.

Mr. Solarz mentioned joint resolutions. I take it that as far as you know at this point, especially Mr. Schmults, a joint resolution replacing one-House vetoes or two-House concurrent resolutions would have no constitutional problems?

Mr. SCHMULTS. That is right. A joint resolution would be one that would be passed by both Houses of Congress and presented to the President for his signature. That is the sort of legislative act envisioned by the Constitution and certainly presents no problem under *Chadha.*

Mr. LAGOMARSINO. The Court would have no problems, even if the joint resolution procedure were a speeded up one giving, as many of the one-House and concurrent resolutions now do, almost any Member of the House or the Senate the privilege of bringing it up on the floor? That would not affect it, I am sure.

Mr. SCHMULTS No; I think any procedure that speeds up the legislative process is to be applauded.

Mr. LAGOMARSINO. So that does suggest itself as a replacement, at least in some cases. I would suggest, especially in the domestic area, where often, as you pointed out, the President is not necessarily directly related to the decision that was made, perhaps, by an independent agency.

Mr. SCHMULTS. Yes, sir.

STANDING OF PRIVATE PARTIES TO SUE UNDER "CHADHA" DECISION DOUBTFUL

Mr. LAGOMARSINO. With regard to the questions that Mr. Winn was asking about the standing to sue of private parties, it just occurs to me—of course, you will want to study this—that the only way that could arise would be if the President made a decision, it were vetoed by Congress and the President, although he said he didn't agree with the veto, acceded to it. I can't imagine that ever happening after the *Chadha* decision.

Mr. SCHMULTS. I thought the question as posed was that there would be a sense of the Congress not to proceed and the President would be persuaded by that sense of the Congress and, in effect, change his mind and then an arms contractor would sue.

When I was talking about standing, I think I was wrapping up into that, too, the question of whether the Government had consented to be sued in that situation. I think when you add standing and consent to be sued and the ultimate question on the merits, certainly I feel strongly that the Government would prevail. There

might be litigation, but I certainly think the Government would prevail in that situation.

Mr. LAGOMARSINO. That is my feeling, too.

I have no further questions, Mr. Chairman.

Chairman ZABLOCKI. Mr. Smith?

STATUTORY AUTHORITY REQUIRED FOR PRESIDENT TO SELL ARMS

Mr. SMITH. Thank you, Mr. Chairman.

Let me go back a little bit to the line that Mr. Solarz was taking in the sense that I am curious as to whether we can back up to really the very beginning. The premise on which his questions were based seems to me to be unanswered, at least as far as I am concerned.

Would you describe for me what you think is the inherent power of the President and the administration to sell arms to begin with? Is it derived from any source other than congressional authority?

Mr. DAM. To sell arms?

Mr. SMITH. Yes.

Mr. DAM. It would be very difficult for me to understand how the President would be able to sell arms without some kind of statutory authority.

Mr. SMITH. I am curious as to your discussion with him about the fact that there is possibly that avenue available; that is, to have arms sales proposed but that under the statutes we could restrict any arms sales, either over a certain amount or any arms sales, by having a joint resolution of Congress to approve them, which would, of course, be subject to presentment.

Theoretically, of course, under that we could disapprove every one. If he vetoed it, there would be no bill. If he vetoed an approval, there would be no bill. Either way we have, in fact, wound up with a legislative veto, haven't we? What I am asking you is what is the basis that you think there is for selling arms to begin with? Would we have the authority in fact to restrict the sale of arms to countries?

Mr. DAM. Let me go back to first principles. The sale of arms has been a well-supported—by both the executive branch and legislative branch—factor in foreign policy for many decades, Democratic administrations, Republican administrations. This committee approves the FMS authorization and the like. It is just part of our foreign policy.

No one has ever suggested that this is an inherent power of the President. It is part of a jointly arrived-at foreign policy. Therefore, the only question is the procedures by which the individual determinations are made. As in every other field, there are some procedures that are better than others. That is all that I understood Mr. Solarz and me to be discussing.

Mr. SMITH. I just wanted to make that clear, that you then basically agree that the power of the President to sell these arms right now basically resides in some grant of authority from someplace other than the Constitution of the United States.

Mr. DAM. I don't see any reason to raise any question of theoretical, abstract, inherent powers, since all Presidents have proceeded under explicit statutory grants.

PROPOSAL TO PRESENT PROPOSED ARMS SALES IN QUARTERLY PACKAGE

Mr. SMITH. Fine.

What would be the positive and possibly the negative aspects, as you see it, of adopting a proposal that was once proposed by Senator Javits, of the administration's offering arms sales as a package every quarter?

Mr. DAM. It just reduces the flexibility of the President to, for particular policy purposes, announce a sale at a particular time, or announce his intention to notify. By restricting the President's flexibility in the conduct of foreign policy, one may be limiting some very important opportunities for achievements, say at a time when one was attempting to settle a war or work out a peace treaty.

Chairman ZABLOCKI. Would the gentleman from Florida yield?

Mr. SMITH. Certainly I will yield.

Chairman ZABLOCKI. The effect it would have is the President could not respond to emergencies. That would be the disadvantage of that proposal.

Mr. BERMAN. Would the gentleman yield further?

Mr. SMITH. I would be happy to yield to the gentleman from California.

PRESIDENTIAL WAIVER INSURES FLEXIBILITY TO RESPOND TO EMERGENCIES

Mr. BERMAN. As I understand the law now, there is no congressional veto provision where the President certifies that it is a national emergency. Isn't that correct? If that is correct, by your own submission, or the Justice Department's statement of the law, the exception on the veto for Presidentially certified national security emergencies.

Given that exception, had you certified the AWACS sale as there would have been no congressional veto authority, why don't you have the flexibility you need to deal with the emergencies that the chairman has spoken of?

Mr. DAM. Mr. Smith was asking me about a bill that he was describing, and I was responding to his hypothetical question. It didn't have any such provision in it. I am just trying to react to the question that was asked me. If you had another statute which had some other provisions, then we could talk about that.

Mr. SMITH. That statute that was referred to by the gentleman from California already exists.

Mr. DAM. Right, but you were suggesting that it would now be a new bill which would say that we had to do them all at one time at a particular interval. I am saying that, so written, it would obviously cut across this.

Mr. SMITH. Obviously, at this point, without some other regard, how would you be deposed to this kind of option?

Mr. DAM. If you say it is a good idea and normally it will be done that way, except when there is some strong, overriding national interest in not doing it at that time, then you have a somewhat different situation.

Obviously there may be some basis for this, but nobody has explained to me why it helps the legislative problem to put them together, to lump them together. It might be a good idea.

Mr. SMITH. I am just exploring your views. Obviously none of us here today, or in any part of the Congress that may be holding hearings on this, has all the answers at this moment. We haven't been able to develop that kind of expertise so quickly.

I would hope that the explorations that we are going through to some degree would be aided by the State Department and by the Justice Department and anybody else who cares to have the input necessary to assure that the executive branch and the judicial branch and the legislative branch continue to function as a check and balance on one another, as was originally advanced by the Constitution. Nobody should see here an advantage for one branch to get a little leg up.

That is why these proposals are just coming out, what Congressman Solarz advanced and just what I am discussing, the previous Javits proposal. Obviously we are going to have to try and find some solution here. There is no small problem involved here.

Mr. DAM. We certainly want to work with you on that. I didn't mean to suggest the contrary. I was just saying it was hard for me to respond because I didn't see why this idea particularly provided that equilibrating advantage.

Mr. SMITH. That is what I was asking you. I was asking you for your thoughts, not for the fact as to whether you would endorse something like this.

EXECUTIVE URGES FLEXIBILITY FOR PRESIDENT IN ARMS SALES

Mr. SCHMULTS. If I could make just one point on that, I think it is interesting that the legislative veto provision in the arms sale law was, in fact, a resolution of disapproval. It seemed to me that this was a recognition by the Congress that in terms of legislative time, including hearings and getting legislation on the calendar, it would be very difficult if you had to take up every case and approve it.

So, it seems to me that when you are considering this, it would be well to take that into account, as you did in passing the original legislative veto provision. A joint resolution of disapproval, while still subject to a Presidential veto—and I acknowledge that, would be a more appropriate vehicle for expressing strong congressional views.

Certainly the need for the President to have some flexibility, in order to deal with foreign governments on a reasonably timely basis, is important beyond the emergency situations. We would urge you to take care, when you look for any new oversight mechanisms, if you feel ones are necessary, not to introduce such inflexibility and rigidity into the system. It hurts the conduct of our foreign affairs in a way that neither you nor we would like.

Mr. DAM. I do want to say that if, for example, it would aid the committee's consideration, we would consult fully with the committee with regard to the timing of sales, where there wasn't any foreign policy question about the exact timing, in order to facilitate consideration. If package consideration might facilitiate that, we

would certainly endeavor to meet the committee's timetable. In fact, we always try to do that.

Mr. SMITH. Thank you.

Thank you, Mr. Chairman.

Chairman ZABLOCKI. Mr. Pritchard?

ENACTED LAWS LIKELY TO STAND ABSENT LEGISLATIVE VETO PROVISIONS

Mr. PRITCHARD. Thank you, Mr. Chairman.

First of all, I am pleased that we are trying to work these things out in a rational and pleasant way, at least to start that way between the two branches of Government.

My understanding—I am not a lawyer—is we have a lot of legislation that has veto provisions in it. This puts a cloud over all those pieces of legislation, does it not, the serious question of the validity of any law that has a veto provision in it? Is that correct?

Mr. SCHMULTS. I really think cloud is perhaps too strong a word because certainly our view, given the Supreme Court's approach to the question of severability, is that the vast majority of these laws will continue to be effective after severing the legislative veto provisions.

That general statement is not very helpful when you are trying to consider any particular law because you have to go through a law-by-law analysis. I think I am safe in saying, given the presumptions the Supreme Court has used, given the tests that they have stated in the first instance, that the vast, vast majority of these laws will continue to be effective and continue to stand absent the legislative veto provisions in them.

Many of them had, as we have said in our testimony, report and wait provisions, which the administration will honor and observe scrupulously, thereby giving Congress a chance during those waiting period, if it wishes to do so, to take some legislative action.

I see no sense of great urgency or emergency here. There is certainly time to consider these things very carefully and to work out sensible solutions.

IF LEGISLATIVE VETO NOT SERVERABLE STATUTE WOULD FALL

Mr. PRITCHARD. Some of those pieces of legislation passed because the provision was in there. It is rather hard to go back and make a judgment on who voted for what because of what provision was in the legislation. Doesn't that put a serious question over the validity of the legislation?

Mr. SCHMULTS. In a sense the way you have stated the question, assumes the result. In order to determine if it is apparent—and courts do this all of the time; indeed—we are going to have to do this and you are going to have to do it, we must analyze the statute and the legislative history.

If, in fact, it is evident that the Congress clearly intended that the grant of a power would not have been given if it had known the legislative veto was going to be declared invalid, then the legislative veto provision would not be severable and presumably both provisions would fall.

That is the analysis that one has to go through. Unless that is clear, unless that is evident, to use the phrase I believe the Supreme Court used, and certainly the first cases that have been considered, at least for the most part, have found that Congress, because the law looks like it is fully operative even without the legislative veto provision, that we believe that most laws will continue to stand.

If Congress disagrees with that result, of course, Congress is free and obviously has the power to change that law.

Mr. PRITCHARD. I have no further questions.

Chairman ZABLOCKI. Mr. Berman?

SEVERABILITY CLAUSE CONTAINED IN WAR POWERS RESOLUTION BUT NOT IN ARMS EXPORT CONTROL ACT

Mr. BERMAN. Thank you, Mr. Chairman.

I was wondering if there is a severability clause in here. When we talk about the legislative veto on sale of arms to foreign countries, are we talking about the International Security Assistance Arms Control Act of 1976 and the International Security Assistance Act of 1977? Those are the two legislative authorizations.

Mr. DAM. I understand that these are the amending statutes, which amend the basic authority of the original export act. That is why I have referred to it as the Arms Export Control Act in this testimony.

Mr. BERMAN. Are there severability clauses in those?

Mr. DAM. I think generally speaking in this particular area there are not.

Mr. BERMAN. Is there a severability clause in the war powers resolution?

Mr. DAM. Yes.

ARMS EXPORT CONTROL ACT IS OPERABLE ABSENT LEGISLATIVE VETO PROVISION

Mr. BERMAN. As Mr. Schmults testified in the Judiciary Subcommittee a couple of days ago in these arms export acts, if there is no severability clause at this point, it would not be clear whether or not the congressional authorization to allow the President to license arms sales to foreign countries exists, if the legislative veto has been struck down without some look at the legislative history and debate at the time that that legislation passed to determine what the intention was of Congress at the time it passed that law. Is that a fair conclusion?

Mr. DAM. People can differ, of course, but I don't think it is correct to say that it is not clear. I have several reasons for saying that.

First of all, the legislative veto provisions were tacked on later, so obviously it was possible for the statute to operate without them. It was passed by the Congress, signed by the President, without these legislative veto provisions. They were added later. Therefore, one can't really conclude that there wouldn't be such authority otherwise. They obviously can operate without the legislative veto provision.

That said, of course, as I said before, we are prepared to discuss what perhaps should be done. Just as a strictly legal question, I don't think that conclusion quite follows.

Mr. BERMAN. Mr. Schmults?

Mr. SCHMULTS. I would agree with that, Mr. Berman. The lack of a severability clause means that one presumption wouldn't be operating, but the general test is that the statute would stand as severed unless it is evident that Congress would not have intended that.

I think the fact, as Mr. Dam stated, that the legislative veto provision was tacked on at a later date is important, unless there is something in the legislative history to indicate otherwise. I don't know how you would go back and say what an earlier Congress would have intended. I suspect that it will be held severable.

Mr. BERMAN. We do have ways for going back and seeing what prior Congresses intended

Mr. SCHMULTS. Yes, and that analysis would have to be done. It may well be as you looked at that you would find something——

Mr. BERMAN. Hypothetically, if at the time that the legislative veto amendment were placed in without any severability clause there was debate which made it clear that Congress chose this act rather than any kind of outright restrict of Presidential authority to sell arms, you might be forced to a different conclusion, I would think, from what you have told us is the way the courts look through these issues.

Mr. DAM. We are talking about presumptions, and the question is whether there is sufficient evidence to overcome the presumption.

ARMS EXPORT CONTROL ACT COVERS GOVERNMENT-TO-GOVERNMENT AND PRIVATE TRANSACTIONS

Mr. BERMAN. Just a real elementary question. These arms sales—let's take AWACS as an example—were these planes to which the United States had title to or are these simply licenses for U.S. corporations to sell a plane or the technology for a plane to foreign countries?

Mr. DAM. In that particular case I am advised that we acquired title and sold it on a government-to-government basis. The statute reaches various private transactions, too.

Mr. SMITH. Will the gentleman yield?

Mr. BERMAN. Yes.

CONGRESSIONAL AUTHORITY TO RECALL TROOPS UNDER WAR POWERS ABSENT LEGISLATIVE VETO PROVISION

Mr. SMITH. I just wanted to ask a question. I am going to be leaving shortly, and I appreciate the time. Right now, what power would the Congress have if the President came and said that he wanted to send some number of marines, say, into a Central American country, based upon your reading of *Chadha* right now? Do we have any power whatsoever residing in Congress at this moment to refuse to allow the President to do that or to have some check on his sending a number of our troops into a foreign country?

Mr. DAM. Of course, you have the power of the purse to start with. That is a very effective power, as history has shown, with regard to the disposition of troops abroad. The war powers resolution itself——

Mr. SMITH. It gives them 60 days, doesn't it?

Mr. DAM. It depends upon the situation. The war powers resolution envisions three different situations. One is a situation in which troops are introduced equipped for combat. Where troops are introduced but they are not equipped for combat, or they are there on a training mission and so forth, the war powers resolution does not address that question, except perhaps in its consultation provision—I am not quite sure on that—but not with regard to the reporting provisions.

If they are equipped for combat but they are not engaged in hostilities and not being introduced into a situation where imminent hostilities are indicated by the circumstances, then the 60-day provision doesn't run, but there is a report.

If they are introduced into the situation of hostilities or a situation where there is imminent threat of hostilities indicated by the circumstances, then you get into this question of the 60-day period under the statute.

As I indicated in my testimony, there is this latent constitutional issue which *Chadha* simply doesn't address as to whether there is this power. *Chadha* doesn't point one way or the other. It is just a question that is inevitably there because the Constitution isn't specific on it.

Mr. SMITH. You and I agree on that. My question was whether or not you feel that there is any other method at this moment for Congress to effectively veto or block that action that the President could take under the War Powers Act.

Mr. DAM. As I say, the whole panoply of powers loosely referred to as the power of the purse, which can be used to affect how our Armed Forces can be used——

Mr. SMITH. You don't think that we could stop the President at this moment from sending those troops, based upon the fact that they are already deployed. The money has been there, the military is there, and they could literally, not theoretically, transport them and drop them on the ground. We have the soldiers, we have the aircraft, we have everything on line. There would be no way to stop that until some point in time after the fact when we would defuse the money.

You are not suggesting that the power of the purse would alter his ability to do it in advance?

Mr. DAM. I do. Though it might raise this latent constitutional question conceivably, but it would be less direct, I can see the possibility of determining what moneys can be used for which would affect vitally the President's power. Absolutely.

Mr. SMITH. Thank you.

Thank you, Mr. Chairman.

WAR POWERS AUTHORIZES CONTINUED PRESENCE OF TROOPS BUT DOES NOT BLOCK INITIAL COMMITMENT OF FORCES

Chairman ZABLOCKI. On that very point, the chairman will now recognize himself for a question that is of vital interest to the Chair, the principal sponsor of the War Powers Act.

The answer would be to the gentleman from Florida, the war powers resolution had never intended to prohibit the President to commit military forces but require a report after their commitment and to first consult before their commitment.

The intent of the war powers resolution would be to cause the executive branch to stop, look, and listen before they move because we do have the power of the purse and the power to declare war.

The Congress under the War Powers Act must authorize the continued presence of U.S. troops involved in hostilities after an initial 60- to 90-day period.

Let me say that I am a little more heartened with the testimony we are hearing today than the testimony than we heard from Mr. Brand on interpretation of the *Chadha* decision.

"CHADHA" DECISION DOES NOT PRECLUDE EXECUTIVE-LEGISLATIVE COOPERATION

I am very pleased that both of you, Mr. Schmults and Mr. Dam, have underlined that the *Chadha* decision is not going to scrap every understanding—that we have between the President and the Congress; that you are going to continue, for example, to give prior notification, on arms sales; that the reporting and waiting period will be continued; that consultation will certainly be continued.

What is most heartening is that the administration desires to cooperate with Congress, as a result of the *Chadha* decision, to continue the procedures that were intended by the law despite the concurrent resolution being found unconstitutional.

Insuring that the decision to go to war would be a collective judgment by the Congress and the President was a major purpose of the War Powers Act. I must congratulate you, Mr. Dam. You have expressed the intent of that particular piece of legislation and the act, the very purpose for which it was introduced and the intent of the legislation.

LEGISLATIVE VETO PROVISION IN WAR POWERS NOT DETERMINING FACTOR IN DECISIONS ON COMMITMENT OF TROOPS

I do want to ask, however, Mr. Dam, on page 10 you said:

> In the decade since the enactment of the War Powers Resolution, no U S forces have been committed to long-term hostilities It is doubtful that Presidents have refrained from such commitments because of the legislative veto in the War Powers Resolution

Would you wish to go further in your perception as to what was the reason Presidents have refrained from such commitments?

Mr DAM. First of all, I think that the circumstances have not called for it. I think beyond that the experience in Vietnam has had a certain impact on all branches. The fact of the matter is that Presidents, particularly in questions of war and peace, seek to lead a united country and certainly a united government.

So, I wouldn't say that the war powers resolution and the spirit that embodies it has had no influence, but I would say the legislative veto provision itself certainly has not been determinative.

I do agree that the war powers resolution embodies a very widespread feeling that it is important that there be this unity when American national security is at stake.

Chairman ZABLOCKI. Section 9 has a severability clause. Certainly Presidents would expect that if their commitment of troops was unpopular, that the Congress would take legislative action to terminate that commitment.

"CHADHA" DECISION WILL REQUIRE RENEWED EXECUTIVE-CONGRESSIONAL COOPERATION

I must say again I am very pleased with the testimony from both of you, Mr. Dam and Mr. Schmults. I am sorry I wasn't here when you presented the last paragraph because I would want to have heard that. I fully agree with your summation. I don't think I can emphasize it more clearly or read it with more emphasis.

> We now have an opportunity, all of us, to put much of that past behind us, and to start afresh Let us shape a new era of harmony between the branches of our government—an era of constructive and fruitful policymaking, an era of creativity and statesmanship. That is President Reagan's goal and the goal of all of us in the administration

I might add that is the goal of the chairman. We look forward to the cooperation. Again, I say it is very heartening that you are apparently not going to take advantage of the *Chadha* decision.

That is the greatest fear on the Hill, that the executive branch may use the *Chadha* decision to its advantage. This would be, I believe, a tactical mistake because Congress will have the last word at any rate, with the power of the purse or by other legislative processes.

We look forward to further cooperation, continued cooperation with the executive branch.

Mr. DAM. Thank you, Mr. Chairman. We are acutely conscious that Congress has the last word. The only caveat I would put in there—and I would ask for your guidance and understanding on this—is that, for example, in the arms sales business, the business of Government will go forward, and it will be necessary to submit various arms sales proposals—I hope they are not controversial—during a period in which there may be continuing consideration, which could last a term or two of Congress, even, of this *Chadha* problem. When we do send it up, we don't do it in order to take advantage of the *Chadha* decision, but simply because we are carrying out the statutory procedure of submitting arms sales proposals to the Congress.

Chairman ZABLOCKI. Thank you very much.

Mr. Weiss?

POWER OF THE PRESIDENT TO COMMIT TROOPS ABSENT WAR POWERS RESOLUTION

Mr. WEISS. Thank you, Mr. Chairman.

I just want very briefly to touch on some fundamentals. I may be confused, but then I think so is the rest of the country.

At the time that the War Powers Act was adopted, as I recollect there was a very serious debate within the Congress as to whether, in fact, the War Powers Act did not give away some of Congress constitutional prerogatives.

Within that context, let me ask you this. Absent the War Powers Act itself, what is your view as to the power of the President to introduce American military forces into areas of hostilities without prior congressional approval?

Mr. DAM. That is an old issue. People have written long books about it on both sides of that question. All I can say is it is an important question. We do have the war powers resolution, and we plan to comply with the procedures of it. The fact that these constitutional issues exist, it seems to me, is interesting, but I do not have any particular wisdom on the subject.

Mr. WEISS. I appreciate that. Let me ask it in a different way. Supposing, in fact, the Congress were to repeal the War Powers Act. What impact would that have on the power of the President, again without further congressional action, to introduce American troops into areas of hostilities?

Mr. DAM. It would put us back in the situation that we were in before the war powers resolution was passed, in which there were 100 and some examples, as I recall, of where Presidents, going back to the beginning of the 19th century, had done so. One can say that they acted unconstitutionally or one can say they acted constitutionally and one can have a debate about that subject.

Mr. WEISS. I must tell you—and I am not going to pursue it any further—that the asking of those two questions and your response to them indicates to me that the matter is not as easily disposed of as your testimony would indicate.

Mr. SCHMULTS. Mr. Weiss, I would like to make only one point there. Your question is a very serious one, obviously.

The war powers resolution itself provides that nothing in the resolution shall be construed as granting any authority to the President with respect to the introduction of U.S. Armed Forces into hostilities.

So, in a sense the war powers resolution is a procedural law, albeit with teeth. One could certainly take the position from this that there is some recognition on the part of Congress that the President does have such authority. I only point out this section——

Mr. WEISS. Or conversely, that the President has no authority at all, except for that which is granted in the particular act.

Mr. SCHMULTS. I don't think this provision could be read that way. It seems to be a recognition by Congress. It was not extending or granting any authority to Congress. Indeed, it appeared to be a recognition that he had some authority and Congress was laying some procedural steps on the exercise of that authority.

Mr. WEISS. Or again, as the chairman indicated, that because of the emergency nature of some of these situations, the Congress wanted to provide some limited opportunity for the President to act in the context of the emergency, but not to deliver to the President its basic constitutional powers by declaration of war.

Mr. SCHMULTS. Yes.

Mr. WEISS. Thank you very much.

Thank you, Mr. Chairman.

Chairman ZABLOCKI. Mr. Levine.

Mr. LEVINE. No questions, Mr. Chairman.

Chairman ZABLOCKI. If there are no further questions, we have ended just in time. The House has a quorum call.

Again, Mr. Dam and Mr. Schmults, thank you very much for your testimony.

The committee stands adjourned until 10 a.m. tomorrow. The witnesses will be Prof. Eugene Gressman, University of North Carolina School of Law, and Prof. David Martin, University of Virginia School of Law.

[Whereupon, at 12:10 p.m. the committee adjourned, to reconvene at 10:20 a.m., Thursday, July 21, 1983.]

THE U.S. SUPREME COURT DECISION REGARDING THE LEGISLATIVE VETO

THURSDAY, JULY 21, 1983

HOUSE OF REPRESENTATIVES,
COMMITTEE ON FOREIGN AFFAIRS,
Washington, D.C.

The committee met at 10:20 a.m., in room 2172, Rayburn House Office Building, Hon. Clement J. Zablocki (chairman) presiding.

Chairman ZABLOCKI. The committee will please come to order.

In view of the fact that Republican members are on their way, we will begin.

Today we meet to continue the hearings on the impact of the Supreme Court's decision in *INS* v. *Chadha,* on the statutes within the purview of the Committee on Foreign Affairs.

Thus far we have received testimony from the Counsel of the House of Representatives, Mr. Stanley Brand, and from two departments of the executive branch: Justice, represented by the Honorable Edward C. Schmults, Deputy Attorney General; and from the Honorable Kenneth W. Dam, Deputy Secretary of State.

Yesterday's testimony from the administration was rather heartening and served to reassure the committee that the executive branch plans to continue to operate within the established legislative procedures which have not been expressly ruled unconstitutional by the Court's decision.

Specifically, they intend to continue to notify Congress in advance of proposed arms sales. Further, with regard to the war powers resolution, they believe that the Court's ruling has touched only section 5(c), which contains the concurrent resolution enabling a legislative veto.

In addition, both witnesses agree that the substitution of a joint resolution for the concurrent resolution in provisions relating to arms transfers would be constitutional.

This morning we are pleased to have before the committee two eminent legal scholars to provide their interpretations of the *Chadha* decision and its implications for laws within the committee's jurisdiction.

It is a pleasure to welcome Prof. Eugene Gressman of the University of North Carolina School of Law, and Prof. David Martin of the University of Virginia School of Law.

Professor Gressman, we will begin with you. I might say to both of you gentlemen that it is up to your discretion whether you want to read your entire statement or summarize. At any rate, your entire statement will be made part of the record.

I ask unanimous consent. Is there objection? There is none.

Chairman ZABLOCKI. If you will proceed, Professor Gressman.

STATEMENT OF EUGENE GRESSMAN, PROFESSOR OF CONSTITUTIONAL LAW, UNIVERSITY OF NORTH CAROLINA, SCHOOL OF LAW

Mr GRESSMAN Thank you, Mr. Chairman.

I, of course, appreciate the opportunity to appear again before this committee. I appeared here once before a couple of years ago in regard to the antinuclear proliferation statute.

I appear here not only in my capacity which you have so generously described as a legal scholar, but also as the Special Counsel to the House of Representatives. My primary assignment has been to argue and brief the *Chadha* case from beginning to end, including the two oral arguments in the Supreme Court.

I have participated in all litigation to date that has involved the legislative veto In that connection, I have worked in close cooperation with Stanley Brand, the General Counsel to the Clerk of the House. He has actively worked with me and argued the lower court case involving the legislative veto of the Federal Trade Commission regulation on used cars.

I do not intend to summarize, except in the briefest possible fashion, the written statement that I have submitted to the committee and which will be part of the record

Nor do I intend to take much time at this point to detail what Justice White rather aptly described as the constitutional myopia of the *Chadha* reasoning, as well as the destructiveness of the *Chadha* ruling itself.

Justice White's dissent in the *Chadha* case effectively demonstrates that the decision reached by the Court in the *Chadha* case simply does not stand up to constitutional analysis. But that is neither here nor there because we are faced with the majority decision of the Supreme Court in this case. It is our duty now to try to pick up the pieces after *Chadha.*

As I point out in the written statement, both Justice White and Justice Powell, while believing on the one hand that the *Chadha* decision effectively outlaws all varieties of legislative vetoes, both stated a reservation that perhaps some statutory context, in which the veto appears, might still pass constitutional muster in the Supreme Court in light of the *Chadha* rationale.

Neither of them dared state exactly where those different contexts might be. But I suggest that it is possible that the foreign affairs field might be subject to a different application of the *Chadha* rationale, leading to a different result.

I summarize in the written statement what I believe to be the essence of the *Chadha* ruling. Without repeating that summary, I believe that the heart and the core of the rule announced in *Chadha* is that the bicameral and presentment requirements of article I apply whenever veto action taken by one or both Houses is essentially legislative in purpose and effect, particularly where the purpose and effect is to alter the legal rights, duties, and relations of persons, including executive branch officials, who are outside the legislative branch.

We have no more definition of what is such a purpose and effect, other than that it be essentially legislative in nature. But it obviously has been applied by *Chadha* to what I consider to be a secondary level of quasi-legislation. Let me explain.

There is and always has been a primary level of legislation, a plenary level wherein the Congress enacts a statute that is subject to presentation to and veto or approval of the President. That situation has always been with us.

Over the last 100 years there has developed a vast, new fourth branch of government, if you will, the administrative branch of the Government. In this situation we have Congress, with Presidential approval, enacting a statute and then within that statute delegating to the administrative agency or to the executive certain quasi-legislative powers. The executive's and the agency's promulgation of those quasi-legislative determinations has never been subject to presentment to the President for approval or veto.

At this secondary level, the Congress has often given complete authority to the agency or to the executive department to issue a quasi-legislative rule or regulation that has the effect of law. That is the whole constitutional theory of administrative law making by delegation.

That theory is what was involved in *Chadha* and in all the administrative regulation cases that have been litigated; that is, we are not dealing with the primary level of plenary legislation. We are dealing with the sublevel of lawmaking by delegation from Congress.

What *Chadha* has done is to equate this primary level with the administrative level of legislation by saying that Congress, if it wants to put its hand into the secondary level, must act in a plenary fashion; that is, it must enact some form of legislation subject to presentment to the President.

That has never before been held by the Supreme Court, and I think the Court, quite frankly, was totally confused in ascribing the bicameral presentation requirements to congressional action at this quasi-legislative level Ascribing those article I requirements to that kind of action, even though the action be legislative in purpose and effect, is inconsistent with constitutional structure. It is not the kind of legislative action that heretofore has been subject to presentment.

There are Court decisions in the past that say that, when dealing with this secondary level of delegated legislative authority, Congress has the discretionary power pursuant to the "necessary and proper" clause either to delegate quasi-legislative authority to an agency or the executive, or to delegate it to the courts, or Congress may keep it and exercise a part of it itself.

The Court has equated these two levels of legislation, the primary and secondary, in a totally confusing way. Having done so, however, the Court has not really invalidated what we like to call a one-House veto or a two-House veto. At the plenary level of legislation, where you propose a bill in Congress to enact some new law, one House can and often does veto the bill. And I suggest it can still be done at the secondary level.

I stood before the Supreme Court last December and pointed out that every day of the week one or the other Houses of Congress

vetoes a proposed law So, I say that if we are going to require this kind of plenary legislative action at the secondary level of delegated authority, we need only require in some fashion that new legislation be put before the Congress to approve some kind of executive or administrative action. But if one House says no, then we have a one-House veto.

Essentially nothing can or will change with respect to the power of the Congress to review and to prohibit executive or administrative action, provided that you comply with the *Chadha* requirement that any congressional approval or disapproval at this secondary level of legislation take the procedural form of plenary legislation subject to presentment to the President.

Quite simply, we have arrived at a situation where Congress from this point on simply needs to make clear in its basic statutory authorizations and provisions that certain executive or administrative action shall terminate upon a given condition or cannot be renewed or expanded unless and until Congress approves by means of a joint resolution, which has to be submitted to the President.

Again, I point out one House can say no to that joint resolution. That would effectively terminate the Presidential action or the administrative action in a given situation. However framed, in other words, a one-house veto is a no vote by one House on some proposition.

One of the complicating features of the *Chadha* decision is its effort to try to convert a negative vote, even at the secondary level, into some affirmative change in the law. That is an impossibility. To do it in *Chadha,* the Court had to mangle the facts and the statute and to arrive at the totally incomprehensible and inaccurate decision that somehow when the House voted not to permit Mr. Chadha to obtain permanent resident status in this country, that was a House direction that Mr. Chadha should be deported.

Be that as it may, we could have achieved the same result in the *Chadha* situation had we had a joint resolution proposition before the House and the Senate which would be subject to approval by the President. If the House had done exactly what it did do in approving House Resolution 926, by disapproving a joint resolution of some sort, we would have had a one-House veto of a proposed joint resolution. That, as I say, fully complies with the *Chadha* ruling and is invulnerable to constitutional challenge.

I have detailed in my written statement certain changes that could be made in three of the provisions and statutes that are under this committee's jurisdiction: The war powers resolution, the Arms Export Control Act, and various provisions that are in H.R. 2992, which is now pending before this committee.

In two instances in H.R 2992, to wit sections 122(j) and 122(k), there are already provisions for action by Congress by joint resolution of approval. That, obviously, is quite proper. There are six other provisions, however, which I have numbered in footnote 4 of my statement, that require at the present time a disapproval by concurrent resolution. We find the same kind of provisions in section 5(c) of the war powers resolution, which speaks of acting by concurrent resolution.

I suggest the simple solution is simply to replace such references to concurrent resolutions with provisions for joint resolutions, sub-

ject to Presidential presentment. I suggest that that will achieve the essential control which Congress must have over executive actions in the foreign affairs field.

Obviously if both Houses agree with a proposed executive action, Presidential approval undoubtedly would be and should be forthcoming. But if one House says no, that is the end of the matter, that is the end of the Executive's authority, which has been conditionally delegated to him. We can call that a veto, if we want, or we can call it compliance with the *Chadha* requirement, which simply changes the procedure to be utilized by this Congress in exercising this review and control.

There is one other option that is conceivable. That is the so-called report and wait provision, which is found particularly in the Arms Export Control Act, section 3(d)(2)(a) Again, the Supreme Court in *Chadha* has a footnote which expressly constitutionalizes this kind of procedure, provided that the Congress acts in some way by statute and/or a joint resolution to disapprove whatever is the subject of the report and wait procedure.

In the Arms Control Act, however, the provision is that Congress may disapprove the report concerning the transfer of certain major defense equipment only by means of a concurrent resolution. There again, I suggest the simple solution is to substitute a joint resolution of approval. You get the same effect. You get the same right to veto that you have always had.

I suggest that the concurrent resolutions in H.R. 2992 be changed to joint resolutions. But it may also be possible, though perhaps hazardous, to retain the concurrent resolutions. We are dealing in H R. 2992 with authorizations for appropriations. I believe there may be a conceptual as well as a constitutional difference between imposing the old-fashioned one-House veto upon some kind of alteration of legal rights or duties of the executive or administrative agency and imposing such a veto technique in the context of an act of Congress that appropriates money.

I don't believe that there are any known constitutional limitations on imposing conditions upon the appropriation of money. Congress holds the purse strings in this Government. This might be one context that Justices Powell and White may have had in mind when they said there are certain contexts in which the traditional one-House veto might be considered appropriate and constitutional; to wit, when Congress imposes a one-House veto as a condition to appropriation or authorizing the appropriation of public funds. I only give this idea to the committee as something to think about.

My overall conclusion is that, given the ambiguities and the myopia, if you will, of the *Chadha* ruling, the simple way to live with it is to provide congressional review and veto by means of a joint resolution of approval of any given executive action, subject to Presidential presentment.

Chairman ZABLOCKI. Thank you, Professor Gressman.

[Mr. Gressman's prepared statement follows.]

PREPARED STATEMENT OF EUGENE GRESSMAN, PROFESSOR OF CONSTITUTIONAL LAW, UNIVERSITY OF NORTH CAROLINA SCHOOL OF LAW

As Special Counsel to the House of Representatives since 1976, I have briefed and argued every legislative veto case litigated thus far, including Immigration and Naturalization Service v. Chadha, decided by the Supreme Court on June 23, 1983. From that vantage point, I believe I can be of some service to this Committee in trying to understand what the Chadha case holds and what its impact will be on the various foreign affairs statutes within this Committee's jurisdiction.

This is not the time or place to detail what Justice White recently described as "the constitutional myopia of the Chadha reasoning," as well as "the destructiveness of the Chadha holding." Process Gas Consumers Group v Consumers Energy Council (July 6, 1983, White, J , dissenting). But some of that myopia and some of that destructiveness will become evident on assessing and accommodating the veto provisions in foreign affairs statutes to the Chadha ruling

Preliminarily, I must emphasize that it is premature, if not inaccurate, to say that the Chadha decision necessarily and automatically outlaws all forms of congressional oversight and all forms of "veto"

or disapproval of executive action in the foreign affairs area. As Justice Powell states in his concurring opinion in Chadha (p. 2), "the respect due [Congress'] judgment as a coordinate branch of Government cautions that our holding should be no more extensive than necessary to decide this [Chadha] case." And following a specific reference to the War Powers Resolution, Justice Powell's concurrence adds (at p. 2, n. 1) that "Whether the veto complies with the Presentment Clause may well turn on the particular context in which it is exercised, and I would be hesitant to conclude that every veto is unconstitutional on the basis of the unusual example presented by this [Chadha] litigation." In his dissenting opinion in Chadha (at p. 2, n. 1), Justice White agrees with Justice Powell's cautionary note about the reach of the Chadha ruling.

Somewhat inconsistently, these sentiments as to the limited reach of the Chadha decision follow hard on the heels of Justice Powell's opening remark (p. 1) that the Court's decision "gives one pause" because it "apparently will invalidate every use of the legislative veto." A similar note is struck at the opening of Justice White's dissent (p. 1), the statement being that the Court's decision "sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a 'legislative veto '" [1/] Hopefully, these statements are guilty of overbreadth, for there are critical constitutional differences that can arise when the veto device is used in differing statutory contexts

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1 Justice White appends to his dissent a list of 56 statutes that currently contain provisions for a one-House or two-House veto, including 12 statutes in the category of foreign affairs and national security laws. This compilation is taken from the Senate's brief in the Chadha case

Indeed, at a later point in his dissent (at pp. 9-10, n. 11), Justice White concedes that he may be wrong in his dire prediction that every form of legislative veto has heard its death knell, perhaps, he says, "the Court remains open to consider whether certain forms of the legislative veto are reconcilable with the Article I requirements."

On its textual face, the majority opinion in Chadha purports to inquire into but one question "whether action of one House of Congress under § 244(c)(2) [of the Immigration and Nationality Act of 1952] violates strictures of the Constitution" (p. 23). With respect to other statutes containing a legislative veto, the Court merely states (p. 24) that "our inquiry [into § 244(c)(2)] is sharpened rather than blunted by the fact that Congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies." That statement is buttressed by a reference to the compilation of 56 statutes, appended to Justice White's dissent, that contain some form of congressional review and veto

Yet at the same time, footnote 16 of the Chadha opinion (at p 33) contains an advisory discussion to the effect that "Congress' authority to delegate portions of its power to administrative agencies provides no support for the argument that Congress can constitutionally control administration of the laws by way of a Congressional veto." This footnote dicta is concerned with a matter not involved in the Chadha case itself, i e., congressional review of agency rulemaking in the nature of lawmaking But the purpose of such dicta became clear on July 6. On that date the Court, in obvious reliance on the footnote dicta, summarily affirmed

two District of Columbia Circuit decisions invalidating congressional review provisions respecting lawmaking regulations proposed to Congress by the Federal Energy Regulatory Commission and the Federal Trade Commission. Process Gas Consumers Group v. Consumers Energy Council (Nos. 81-2008, 81-2020, 81-2171, 82-177, 82-209, 82-935 and 82-1044, July 6, 1983). As Justice White's dissent stated, such summary affirmance -- without hearing any arguments from the two Houses of Congress -- "is hardly surprising," given the Chadha decision and its footnote 16.

What we have before us, then, is the Supreme Court opinion in Chadha that has two dimensions. (1) its obvious application to the rather unique suspension of deportation proceedings under Section 244 of the Immigration and Nationality Act, and (2) an extension of the ruling and rationale to the broad area of delegated administrative lawmaking. One cannot be certain at this point whether the Court intends the Chadha ruling to be applicable to all other areas where the legislative veto device has been authorized. Ordinarily, one would expect the Court to adhere to the traditional rule not to "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." Liverpool Steamship Co. v. Emigration Commissioners, 113 U S. 33, 39 (1885). But the legislative veto situation is apparently not conducive to an ordinary kind of constitutional adjudication. We have already seen one summary application of the Chadha constitutional rule beyond "the precise facts to which it is to be applied " Who can say where the next summary application will come from, and what will be the subject matter of such application?

More precisely, the question the Committee must address is this does the Chadha decision necessarily mean that Congress is constitutionally incapable of using any and all forms of the legislative review or veto device to oversee and review the delegated functions of the President in the foreign affairs area? Secondarily, the Committee must examine what optional techniques are available, if Chadha be deemed to prohibit the use of the traditional veto device in this area.

To answer those questions, we must first summarize the rationale and the critical holdings of Chadha.

A Summary of the Chadha ruling

(1) A threshold but important aspect of the Chadha ruling is its abandonment of virtually all the normal standing requirements with respect to challenges by private citizens to the constitutionality of the legislative veto. We can see this abandonment particularly in the administrative regulation cases, as summarily affirmed on July 6. It is now the law that a complaining citizen has standing to bring such a challenge, without regard to immediate or demonstrable injury, provided only that he might benefit in the future had the governmental rule not been vetoed. In short, prospective beneficiaries can now challenge the veto. Their injury is said to lie in the loss of prospective benefits had Congress allowed the governmental rule to become effective.

(2) The Court has lowered its severability standards, to the point where it is virtually impossible to convince the courts -- through use of the typical severability clause -- that Congress intends the legislative veto provision to be inseverable from the remainder of any given statute. This was one of the points made in the dissents of Justice White and Justice Rehnquist

(3) The heart of the constitutional rule announced in Chadha is that the bicameral and presentment requirements of Article I apply whenever veto action taken by one or both Houses is "essentially legislative in purpose and effect" (p. 32). [2/] That is particularly true, said the Court, where the purpose and effect is to alter "the legal rights, duties and relations of persons [including "Executive Branch officials"] . . . outside the legislative branch" (p 32). While the Court did not try to define further what it means by altering the "legal rights, duties and relations of . Executive Branch officials," presumably that means that Congress cannot veto and thereby alter any action taken by the Executive in execution of what he conceives to be his duties delegated to him by statute. All of which means, in my judgment, that the Court has constitutionalized an Imperial President, free to execute the statutory laws as he sees fit, subject only to the legislative power of Congress to enact amendatory legislation withdrawing such delegated functions from the Executive

(4) In a somewhat more particularized sense, Chadha holds that a one-House disapproval of the Attorney General's order suspending a deportation, pursuant to Section 244 of the Immigration and Nationality Act, is an impermissible exercise of legislative power It does not comply, says the Court, with (a) the prerequisites for bicameral lawmaking implicit in Article I, Section 1 of the Constitution, or (b) the requirement of Article I, Section 7, clauses 2 and 3, that all bills and

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2 While the Court referred here only to a one-House veto, which was the situation in Chadha, there is no reason to believe that a different result would be reached in a two-House concurrent resolution veto. Indeed, that was the situation in the Federal Trade Commission regulation veto case.

resolutions and votes to which the concurrence of both Houses "may be necessary" shall be "presented to the President of the United States." In other words, in executing its legislative functions with respect to lawmaking, Congress is restricted to the bicameral processes, plus presentment to the President for veto or approval. Thus we have the awkward result that, if Congress wants to express its disapproval of some Executive action or wants to postpone the effectiveness of some Executive action until Congress gives its approval, a new statute must be enacted and submitted to the same Executive whose action inspired congressional concern and disapproval.

(5) Finally, Chadha extends its constitutional rule to the administrative lawmaking area. In footnote 16, the Court proclaims that Congress cannot "constitutionally control administration of the laws by way of a Congressional veto," at least in the area of delegated administrative lawmaking. And so, as a companion to the Imperial President, the Court has constitutionalized the Imperial Administrative Agency, free to execute its delegated lawmaking as it sees fit, subject only to the power of Congress to initiate plenary legislation amending or withdrawing some or all of the delegated lawmaking functions.

All the foregoing constitutional propositions, I might add, are reached without benefit of any express constitutional language prohibiting the use of the congressional veto device. Moreover, in establishing these propositions, the Court studiously and intentionally ignores the constitutional analysis advanced in briefs and oral arguments on behalf of the House of Representatives, an analysis that I shall forever believe fully sustains the validity of the use of the congressional veto device. The analysis is premised upon the Necessary and Proper Clause, the very

same clause cited in the War Powers Resolution as authority for the legislative powers -- including the legislative veto provisions -- exercised in the Resolution. See 50 U S C. § 1541(b).

The ultimate and most destructive result of the Chadha decision is to take away from Congress much of its capacity, under the Necessary and Proper Clause, "to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances." McCulloch v. Maryland, 4 Wheat. 316, 415 (1819)(Marshall, C.J.). Under the rubric of preventing an excessive and "tyrannical" exercise of power by the Congress, the Court has succeeded in transferring to the Executive and to administrative agencies an uncontrolled power to exercise the various powers delegated to them by Congress.

The implications of this major shift in governmental power may be most significant in the foreign affairs area. The Chadha rationale places a roadblock in the way of achieving what this Committee ten years ago described as the "necessary and proper" outlining of "arrangements which would allow the President and Congress to work together in mutual respect and maximum harmony toward their ultimate goal of maintaining the peace and security of the Nation." House Report No. 93-287 (June 15, 1973), accompanying the War Powers Resolution.

In the Court's myopic view, the only constitutional way that Congress can seek to achieve such "necessary and proper" accommodations with the Executive is to follow at all times the bicameral/presentment route, a route the Court concedes may "often seem clumsy, inefficient,

even unworkable" (p. 39). I, for one, refuse to believe that the Framers, having carefully crafted the Necessary and Proper Clause, intended that the Clause be ignored as a tool of constitutional interpretation and application. Nor did the Framers indicate that Congress be confined, in meeting the unforseeable governmental problems of the future, to legislative means that may in fact be "clumsy, inefficient, even unworkable " In short, the Court has turned a deaf ear to the magnificent chords of the Constitution, a charter of government for generations to come.

The Options Left Open to Congress

Now we must turn to the task of reconsideration and reconstruction in the aftermath of Chadha. And since we are dealing within the foreign affairs context, where powers are shared by the Congress and the Executive, we may find some basis for the hope expressed by Justices Powell and White that the veto in some contexts, not involved in Chadha, might pass constitutional muster. But my basic assumption is that the Chadha rule should be followed in this area unless its inapplicability appears clear. Accordingly, I suggest that the following options and possibilities be considered by this Committee in reviewing veto provisions in statutes within its jurisdiction 3/

(1) The most obvious option is simply to substitute joint resolutions for concurrent resolutions as the vehicle for either approving or disapproving Executive action. Concurrent resolutions of disapproval, which need not be presented to the President, are simply two-House vetoes within the scope of the Chadha rule. But since joint resolutions must be adopted by both Houses and submitted to the President, they

3. Time has permitted me to examine only three sets of veto provisions -- those in the War Powers Resolution, the Arms Export Control Act and the pending H R 2992 (98th Cong , 1st Sess)

satisfy all the constitutional requirements voiced in Chadha, whether the resolutions be approving or disapproving in nature.

As presently structured, the concurrent resolution contained in Section 5(c) of the War Powers Resolution would seem vulnerable under Chadha. To use a concurrent resolution to direct the President to remove armed forces he has committed overseas, without a declaration of war, specific statutory authorization, or a national emergency, is arguably "legislative in purpose and effect" and arguably alters "the legal rights, duties and relations of . . Executive Branch officials," as those ambiguous words are used in Chadha. And it must be said that the Executive, in this context, is certain to claim that he is acting in execution of his own great implied powers in foreign affairs.

Thus if it be accurate to say that the Chadha defintion of legislative action is applicable, the congressional response could be either to prohibit the use of armed forces in such situations or to place appropriate time limits on such Presidential action. Such a prohibition or limitation, of course, would require enactment of an amendment to the War Powers Resolution, with provision for lifting either a prohibition or limitation by means of a joint resolution. Such procedure may be highly volatile from the political standpoint, and it may even be "clumsy, inefficient, even unworkable" from the practical standpoint. But such is the price we must all pay for the Chadha decision.

One of the trade-offs for going the route of the joint resolution is to build into the underlying statutes or resolutions various restrictions on the amount or nature of the power to be exercised by the Executive.

There can be total withdrawal of delegated or authorized authority in this area, or there can be strict time limits on the use of authorized authority. As indicated, the Executive would have to propose a new statute or suggest the adoption of a joint resolution if he desired the prohibition or limitation lifted. Alternatively, a joint resolution could be structured negatively, to cut off or disapprove further execution of authorized or delegated authority. But it may be less politically awkward to employ the joint resolution in an affirmative fashion, to approve some Executive action not otherwise authorized in time or in substance.

(2) A second option may be available in the context of a statute authorizing appropriations for foreign aid or military assistance, in the manner of H. R. 2992. I raise two questions in this connection. Can a veto by way of a concurrent resolution be used as a condition to to the appropriation or expenditure of funds by Congress? Can this be one of the statutory veto contexts that Justices Powell and White think might still pass constitutional muster, given the Chadha decision?

In H. R. 2992, there are six provisions for vetoes by way of concurrent resolutions of disapproval, plus two provisions for joint resolutions approving continuation of foreign aid on the basis of reports to Congress. 4/ Approving continued aid by joint resolution presents no constitutional problem But that is no more of a condition or limitation on the use by the Executive of funds appropriated by Congress than are provisions for disapproval of continued aid by

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4 Provisions for disapproval by concurrent resolution are found in Sections 122(e), 122(f), 122(g), 536(e), 536(e)(2) and 536(e)(3) Provisions for approval by joint resolution are found in Sections 122(j) and 122(k)

concurrent resolution. The point is that placing a veto limitation on the appropriation and expenditure of public funds is not the functional equivalent of legislative invasion into the executive administration of a statute. Certainly the President has no implied right or duty, or any Article II power, to spend or stop spending funds appropriated by Congress other than on the conditions (including concurrent resolution vetoes) specified in the relevant appropriation and authorization statutes.

Underlying this option is the fact that there are no established constitutional limitations on the congressional power of the purse, at least with respect to executive powers. When Congress acts to authorize the expenditure of public funds, the Executive is not free to make those expenditures without regard to limitations and conditions set by statute. And when expenditures are authorized in the area of foreign affairs, such limitations and conditions on expenditures become imbued with political questions and thus beyond the constitutional power of courts to review or revise.

Hence I suggest that serious consideration be given to retaining whatever kind of review and control techniques, including concurrent resolution vetoes, that Congress considers necessary and proper in the area of foreign and military aid expenditures. The only alternative to that technique would be adoption of the joint resolution method as the sole means of expressing approval or disapproval of Executive expenditure decisions.

(3) A third kind of option, which may be of some utility in the foreign affairs field, is the so-called "report and wait" technique. Under this procedure, the President's action on a specified matter would not take effect until it has been reported to Congress and has lain over in Congress for a specified period of time. The Congress may review the proposed action during that period, and it may enact legislation during the period to bar the effectiveness of the reported action. But if no such legislation is enacted, the Executive action becomes effective at the end of the specified period. The Chadha opinion expressly recognizes the constitutionality of this technique (p. 14, footnote 9).

Section 3(d)(2)(A) of the Arms Export Control Act, 22 U.S.C. 2753(d)(2)(A), represents a somewhat questionable variation of this "report and wait" technique. It provides that a presidential consent to the transfer of certain major defense equipment shall become effective 30 days after submission to Congress of a written certification concerning the proposed transfer "only if Congress does not adopt, within such 30-day period, a concurrent resolution disapproving the proposed transfer."

Read literally, Chadha approves this kind of disapproval only in the form of new enacted legislation Thus a joint resolution of approval or disapproval might be considered as a substitute for the concurrent resolution of disapproval referred to in Section 3(d)(2)(A). By requiring a joint resolution of approval, Congress could effectively block a proposed transfer unless both Houses affirmatively approve.

I regret that the constraints of time have made impossible more complete evaluations of the options left open to Congress in

this area, particularly in light of all the 16 statutes under this Committee's jurisdiction. The decisions to be made by this Committee are not easily or quickly reached. The Chadha decision is too new, too ambiguous, too skewed to permit ready answers at this point. For these reasons, I stand ready to assist this Committee and its staff in all appropriate ways in the days ahead.

Chairman ZABLOCKI. Professor Martin?

STATEMENT OF DAVID A. MARTIN, PROFESSOR, UNIVERSITY OF VIRGINIA, SCHOOL OF LAW

Mr. MARTIN. Thank you, Mr Chairman.

I appreciate your invitation to appear here today to review the *Chadha* decision and to explore the possibilities for congressional response. I am going to summarize briefly my longer statement, which I have submitted for the record.

Undeniably the court has issued a landmark decision with far-reaching implications, but unlike Professor Gressman, I believe that the decision was rightly decided I say that even though I am certainly sympathetic to the concerns he mentioned about executive branch aggrandizement and independent agency behavior

The ruling was surely intended to signal that all legislative vetoes whether exercised by one House or both, are unconstitutional. Despite some early press reports, however, the *Chadha* case by no means hands a clear-cut victory to the executive, nor a defeat to the Congress in the long run Rather, it represents a victory for sounder and more responsible decisionmaking on public policy questions.

I expect we are going to see, as this hearing indicates, a period of intensive reevaluation and possibly adjustment of statutes that now contain legislative veto provisions. There are a wide variety of possibilities that are open to the Congress, each with different implications for policy decisions and with varying potentials for disruption of effective Government action.

Congress, I believe, should resist the temptation to seize on a single device or approach as a way of checking the executive branch in this new environment. Instead, you should examine each policy context carefully and choose the control mechanism that is best suited to that particular field.

First, let me discuss briefly the *Chadha* case itself. As you know, that case involved what I believe to have been one particularly vulnerable application of the legislative veto device—to review individual immigration adjudications

Chadha and his supporters advanced numerous constitutional challenges against this congressional action, but the Supreme Court chose to rest its decision on two grounds that have the widest possible impact.

The Court held first that the bicameral requirement must be honored when Congress makes any decisions of this kind, overturn-

ing an executive decision. More fundamentally, the Court also held that disapproval resolutions, even when they are voted by both Houses of Congress, must be presented to the President for his veto or approval under the presentment clause.

In short, if Congress is to reject or modify actions of the executive or of the agencies, the Court held that it must do so by passing full-fledged legislation. No variant of the legislative veto, as that term has usually been understood, whether exercised by a committee, by one House or by concurrent resolution of both Houses, survives this constitutional holding.

If that is the holding, there remains, of course, in each setting a question of severability. The Court's decisions over the last month suggest strongly that it will go out of its way to save the rest of any statute having a legislative veto provision, whether or not the statute contains an express severability clause.

The net effect is a strong presumption that the basic statutory authorities will remain in place, that the executive branch department or independent agency will retain the authority delegated in the underlying statute, and that the Court will treat the legislative veto clause as a simple report and wait provision.

The agency still must delay the effective date of its proposed action for the time prescribed in the statute. Congress, of course, retains an opportunity to disapprove within that period, but any such disapproval must come in the form of full-fledged legislation.

This approach favoring severability, whether or not it accurately reflects the original congressional intent in passing a statute with a legislative veto provision, certainly minimizes likely disruption of ongoing government activities and programs during this interim period, while Congress rethinks the various statutes in light of the *Chadha* holding.

Naturally Congress has the power to terminate the delegation or to rewrite it or to narrow it, if you ultimately decide that the statute should not stand once it has been stripped of the veto arrangements.

As to the merits of the Court's holding on the constitutional issues in *Chadha,* many people have found the Court's opinion disappointing. The Court did not discuss the functional arguments for and against the legislative veto, even though a rich variety of arguments on that score had been advanced in the briefs and in academic commentary on this issue.

Instead, the Court issued an opinion that is striking for its adherence to a straightforward, literal interpretation of the bicameralism and presentment provisions. Nevertheless, I believe that there is a strong functional case to be made for the result that the Court reached. I strongly suspect that most Justices in the majority considered those arguments carefully before agreeing to go along with the Chief Justice's strict constructionist opinion.

In my prepared testimony and in earlier writing on the subject I have reviewed those functional and pragmatic arguments that in my view justify the result that the Court reached. I am not going to repeat them here, but I would be happy to discuss them further in response to questions, if you wish.

I acknowledge, however, that the functional arguments against the veto are not quite as strong in the foreign affairs realm as they are, for example, in contexts like rulemaking.

Those functional arguments rest in large part on the view that Congress has alternative and clearly superior means to control the executive if the legislative veto is not used Those means consist of acting by statute. Usually that will entail progressive narrowing and refinement of the standards that govern delegations to an independent agency or to an executive branch department

In foreign affairs, such detailed, advanced statutory specification is often impractical. Matters must be approached case by case, and flexibility must often be maintained Nevertheless, I think it was still proper for the Court to refuse to carve out a foreign affairs exception to its ruling in *Chadha* Such an exception would have been very hard to administer, both for the courts and also for the Congress and the executive branch in trying to sort out their respective relationships in the light of such a holding

Beyond this, you can be sure that such an exception would have met strong objections from the executive branch based on a claim of inherent executive discretion in foreign policy

Perhaps more importantly, in my view the legislative veto has played a less significant role in Congress rightful reassertion of its part in foreign affairs decisions than is usually appreciated

The war powers resolution provides the best illustration of this point. Despite some premature obituaries for that statute that appeared in the press immediately after the *Chadha* decision, the most important provisions of the war powers resolution clearly survived that holding.

The war powers resolution explicitly provides that, with minor exceptions, the President may not introduce troops into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances and keep them there for longer than 60 days unless he receives express statutory authority or a declaration of war from the Congress.

As a result, the burden of overcoming legislative inertia is on the President. If he is unable to push that legislation through the Congress in 60 days, then he must pull the troops out.

The legislative veto would have come into play under the war powers resolution only if Congress wished to insist on removal of the troops before 60 days had elapsed. But only in the most extraordinary of political circumstances, I suggest, would Congress defy a sitting President in this fashion.

Realistically, Congress is not likely to rally even a simple majority for a veto resolution of that kind unless the President has virtually gone off the deep end, introducing troops in a way that is immediately condemned by the overwhelming majority of the public

In those unlikely circumstances, it would usually be possible to rally a two-thirds majority as well, and thereby overcome a veto of any legislation bringing an early end to the military adventure; that is, before the 60 days have passed For these reasons, I do not believe that it is necessary to alter the war powers resolution as a result of the *Chadha* decision. That vital 60-day limit survives

This legislative model that I am describing, which shifts the burden of legislative inertia to the President, could be used in

other carefully selected areas to regain a greater measure of congressional control after *Chadha.*

I have described in my prepared statement the possible application of this approach to large arms sales under section 36(b) of the Arms Export Control Act. You may wish to apply it also in other settings. Nevertheless, such a change constitutes potent medicine and should be used sparingly.

Most of the time, Congress probably will wish to retain its control over governmental actions through enhanced oversight and through the use of full-fledged legislation to correct errors and abuses committed by the executive departments and the agencies.

With respect to such corrective legislation, I believe that the threat of Presidential veto is not as severe as it has often been made to sound. I spell out my reasons for that conclusion in my prepared statement.

I am also somewhat skeptical about the often-heard claim that the ordinary legislative process is too cumbersome to allow for such responses when they are necessary. That skepticism is especially valid now that most areas of Government activity are covered by a requirement that there be annual or biennial authorizing legislation. That fully authoritative legislation is going to be going through the allegedly cumbersome congressional process every year or every 2 years, and amendments can be added to authorizing bills which would alter an action taken by a department or an agency.

If the legislative process is judged too cumbersome for responses, then it is up to Congress to consider carefully tailored measures to streamline those internal processes I would offer one warning on that score, however, and it applies more broadly—not necessarily to the matters that are the particular concern of this committee.

The *Chadha* decision, in my view, should be the occasion for Congress to regain control by more regular use of its affirmative statutory powers rather than by vain attempts to duplicate the often unhelpful pure negatives accomplished by the legislative veto.

In short, Congress should fulfill its responsibility not only to tell the agencies which steps were wrong, but to go beyond this; to take on the interest groups and decide which of the many other options still open to the agency should be chosen. That requires tough political choices.

Some proposals for streamlining congressional procedures will probably channel most congressional responses toward pure negation. I saw in the paper this morning that Senators Levin and Boren have renewed their proposal for control of agency rulemaking.

There is much that is commendable in the versions of that bill that I have seen, but I do have one concern about it—that is, in the way it streamlines internal procedures to respond to agency rulemaking. The only kind of joint resolution that can take advantage of those expedited procedures is one that simply negatives what the agency has done. As I understand it, it would not be possible to add amendments to such a resolution that would tell the agency affirmatively what it should do.

In most settings I believe biasing the response toward mere congressional disapproval should be avoided. I urge that those procedural proposals not be adopted in exactly that form.

I hope these reflections will prove useful. I would be glad to respond to your questions.

Thank you.

Chairman ZABLOCKI. Thank you, Professor Martin.

[Professor Martin's prepared statement follows:]

PREPARED STATEMENT OF DAVID A MARTIN, PROFESSOR, UNIVERSITY OF VIRGINIA, SCHOOL OF LAW

I appreciate the invitation to appear before this Committee to assist in reviewing the Supreme Court's decision in INS v. Chadha (51 U.S.L.W. 4907, June 23, 1983), and to explore the most effective Congressional response. Undeniably, the Court has issued a landmark decision with far-reaching implications. Its ruling was surely intended to signal that all legislative vetoes, exercised by one House or by both, are unconstitutional. I will describe the decision and briefly summarize my reasons for believing the Court reached the right result. I also want to emphasize that, despite early press reports, the Chadha case by no means hands a clear-cut victory to the Executive nor a defeat to Congress in the long run. Rather it represents a victory for sounder and more responsible decisionmaking on public policy--a victory for the public.

I expect we will see, as this hearing indicates, a period of intensive reevaluation and possible adjustment of statutes that now contain legislative veto provisions. In many instances, Congress will probably choose to leave broad Executive authority in place, despite the veto's demise. Sometimes, I would hope, Congress will respond by enacting new, carefully considered, substantive limitations on delegated authority, and it may even choose to revoke certain delegations. Occasionally, although often less helpfully, Congress may develop new procedural devices that will allow quick negation, by statute, of Executive or agency action deemed seriously deficient. I will conclude with a brief review of several possibilities for Congressional responses, saving for the question period more detailed consideration of those areas that are of special interest to this Committee.

The Chadha Decision

As you know, the Chadha case involved one particular application of the legislative veto device--indeed, probably one of the most vulnerable examples of the veto, because it resulted in legislative review, without significant procedural safeguards, of individual adjudications. There the House passed a simple resolution to reverse the Attorney General's decision on the immigration status of an alien who had successfully applied for administrative relief from deportation. Chadha and his supporters advanced numerous constitutional challenges against this congressional action, but the Supreme Court chose to rest its decision on two grounds that wind up having the widest possible impact. The Court held, first, that the bicameralism requirement must be

honored when Congress makes any decision of this kind, overturning an Executive action. More fundamentally, the Court also held that disapproval resolutions, even when voted by both Houses of Congress, must be presented to the President for his veto or approval, under the Presentment Clause (Article I, Section 7 of the Constitution).

In short, if Congress is to reject or modify actions of the Executive or the agencies, the Court held that it must do so by passing full-fledged legislation. No variant of the legislative veto (as that term is usually understood), whether exercised by a committee, by one House, or by concurrent resolution of both Houses, survives this constitutional holding. If there was any doubt about the broad scope of the Supreme Court's decision after Chadha itself, I submit that such doubt was resolved by the Court's actions two weeks later summarily affirming two decisions of the Court of Appeals for the District of Columbia Circuit. Those cases had held unconstitutional two different exercises of the legislative veto as applied to agency rulemaking--one a one-House veto, the other a concurrent resolution veto. (Consumer Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982); Consumers' Union v. FTC, 51 U.S.L.W. 2262 (D.C. Cir. 1982)).

Some early commentary on the Chadha case has criticized the Court for the breadth of its holding. It has suggested (as Justice Powell had urged in his separate concurrence) that the Court should have chosen a narrow ground of decision, thereby leaving open the constitutional validity of the legislative veto as applied in other contexts, such as rulemaking, reorganization, or foreign affairs. As a general proposition, I ordinarily agree with that basic approach to constitutional adjudication. Narrower constitutional holdings are often preferable, so as to avoid unnecessarily constitutionalizing wide areas of conduct and policy and thereby inhibiting future flexibility and experimentation.

But in this particular context, we are fortunate, in my view, to have a clear and decisive answer to a long-contested constitutional question. After all, we have had fifty years of experimentation with legislative vetoes already, and we were seeing expanding use of the device by the Congress, especially to oversee agency rulemaking--all this in the face of fairly consistent resistance by eleven Chief Executives. The Court had brushed up against the issue at least as long ago as 1975, in Buckley v. Valeo (424 U.S. 1 (1976)), the campaign financing case, and a few times since then, without definitive resolution. The Court kept the Chadha case itself under review for nearly two years, on argument and reargument. The briefs and the extensive academic commentary on the issue made the Court fully aware of all the potential applications of the veto and of all its alleged virtues as a pragmatic innovation designed to cope with new realities and especially to counterbalance expanding Executive power.

If, after that kind of consideration, a solid majority of six Justices was persuaded that all legislative veto devices are invalid because they violate the Presentment Clause--whatever other defects certain other legislative vetoes, like the one in the immigration laws, might suffer from--then it is best that we know that conclusion now. (Indeed, there may be eight Justices who ultimately agree with that analysis; Justice Rehnquist and Justice Powell have not yet taken a position on the Presentment Clause issue.) Had the Court majority kept that view hidden by deciding the case on an ostensibly narrower ground, we would have had to wait through additional years of expensive litigation before discovering that the Court was ultimately prepared to hold all applications of the device invalid. In the meantime, Congress doubtless would have spent considerable effort in devising new forms of the legislative veto to fit the progressively tightening boundaries sketched by each of the successive court decisions--only to learn, at the end of all that creative legislative draftsmanship, that its labors were futile.

As it is, we need not waste effort on such attempts. Congress may now devote its full attention to adjusting the laws in light of a definitive holding which, although sweeping, sets forth relatively clear dividing lines between valid and invalid congressional action. Moreover, when the dust settles, it will become apparent that Congress still has extensive powers to check irresponsible Executive action, if only it has the will to use them.

Severability

If the Court has indeed ruled all legislative veto provisions invalid, a question remains concerning the precise effect this doctrine will have on the hundreds of existing statutes containing such provisions. Will those statutory schemes fall in their entirety, or will the courts treat legislative veto provisions as severable? The Court's decisions over the last month suggest strongly that it will go out of its way to find severability. In Chadha itself, the Court seemed to place heavy reliance on the express severability provision in the Immigration and Nationality Act. But a severability clause, it now appears, is not indispensable to such a conclusion. In the FERC case, the District of Columbia Circuit had found that the legislative veto provision was severable from the rest of the incremental pricing scheme under the Natural Gas Policy Act, even though that Act contained no express severability clause. The Supreme Court affirmed that decision summarily on July 6.

The net effect of these rulings is a strong presumption that the basic statutory authorities will remain in place--that is, that the Executive Branch or independent agency will retain the authority delegated in the underlying statute--and that the Court will treat the legislative veto provision as simply a "report and wait" provision. The agency still must delay the effective date of its proposed action for the time prescribed in the statute,

and Congress will retain an opportunity to disapprove within that period. But any such disapproval must come in the form of full-fledged legislation.

If one takes seriously the usual judicial tests for severability (would Congress have enacted the rest of the statute without the invalid clause or provision?), then there are grounds to quarrel with the Court's easy assumption of severability. The legislative veto at times has served as the crucial element of a legislative compromise, without which enactment would have been unlikely. Nevertheless, despite such lawyer's quarrels, the Court's approach favoring severability has many advantages in pragmatic terms. By transmuting legislative veto provisions into "report and wait" provisions, the Court minimizes likely disruption of on-going government activities and programs during the interim period while Congress rethinks the various statutory schemes in light of the Chadha holding. Naturally, Congress has the power to terminate the delegation or to rewrite or narrow it, if Congress ultimately decides that the statute should not stand once it is shorn of the veto arrangements.

The Merits

The Court's discussion of the reasons for its holding disappointed many participants in the previous debate over the legislative veto, because the opinion relies almost exclusively on a simple and strictly literal reading of the presentment and bicameral provisions in the Constitution. As anyone who has even dipped a toe into the extensive literature on the issue knows, commentators and litigants have advanced a rich array of inventive and subtle arguments and counterarguments on the prudence and constitutionality of the legislative veto. Several creative lines of proof have been offered to show why the legislative veto does not contravene the constitutional clauses on which the court placed principal reliance, and to show further that the veto actually serves the aims of the Separation of Powers doctrine by adding a needed check on the one branch--the Executive--that now threatens to upset the constitutional balance. For better or worse, most of this intriguing terrain is left wholly unexplored in the Court's opinion.

Nevertheless, I strongly suspect that the Justices in the majority spent considerable time reviewing those arguments and paying careful heed to the claims that the legislative veto is needed in light of the growth of the Executive Branch. We know that the Justices are closely acquainted with the potential dangers of Executive aggrandizement; there has been little turnover at the Court since the epic judicial battles involving the Nixon Administration. Moreover, the majority certainly includes Justices who do not habitually engage in such strict and literal construction of constitutional provisions. For my own part, I do not believe a majority would have joined the opinion for the Court unless they were persuaded of solid, functional, pragmatic reasons why a literal construction here in this context makes

sense for the sound functioning of our government in the future. I believe that the Chadha decision represents, although without great elaboration, a judgment by at least six of the Justices that Congress retains ample means to constrain the modern Executive Branch through other tools clearly at its constitutional disposal, if only Congress musters the political will to use them.

I have set forth elsewhere my own version of the functional arguments against the legislative veto (68 Va. L. Rev. 253 (1982)). I believe, as a result of that study, that the functional disadvantages of the veto far outweigh its putative advantages in the vast majority of areas where it has been employed--even when one takes account of legitimate worries about the modern growth of the Executive Branch. In practical terms, these functional arguments justify the Court's literal reading of the Presentment Clause. I will summarize them very briefly.

Too often, the legislative veto merely gave the appearance of an improved check on the Executive while in reality sparing Congress the political pain of using other, more effective and responsible, restraints. The legislative veto can be used only to negate Executive action. But the easy part of administration consists in pointing out the disadvantages and costs of any proposed action or set of regulations. The tough part--but always a necessary part--is to go on and decide what should be done instead, to pick among the three or four or five competing options that are otherwise open. Each of them will have its own set of disadvantages and costs. If Congress is going to veto one, it should go ahead and say which of the other troublesome options ought to be chosen. A veto resolution cannot be used for these purposes, since it can only negate. If a statutory response is required, as the Court has now held, the odds are somewhat better that Congress will shoulder its full affirmative responsibilities in the course of responding to the Executive action.

Beyond these difficulties, the legislative veto opened up additional possibilities for governmental deadlock and impasse. The Federal Elections Commission and the General Services Administration, for example, went through lengthy periods in the mid-1970's when they could not secure Congressional approval of successive sets of regulations they deemed essential to carry out their statutory responsibilities. (See Bruff and Gellhorn, Congressional Control of Administrative Regulation: A Study of Legislative Vetoes, 90 Harv. L. Rev. 1369 (1977).) Those of us who believe our constitutional system of checks and balances already yields enough--perhaps too many--opportunities for stalemate are not sorry to see the Court refuse to add another.

Without the veto, Congress still has other and more effective means to check the Executive Branch, usually by narrowing the delegation to the administrative agency or Executive department. This is not to assert that the first statute launching a regulatory agency must contain an unrealistic measure of detail

and foresight in order to provide such narrower standards. Rather, it is to suggest that if Congress truly wishes to control the agency--hold it accountable to the electorate Congress represents--then the elected legislature should respond to the information generated by the ongoing regulatory venture and periodically refine and tighten the standards and guidelines of the delegation, through statutory amendment. Congress has not used this approach sufficiently because too often such tough choices require a political courage that seems beyond Congress's institutional capacity. If Congress cannot find the will to control agencies by making all parts of the necessary choice, then I suggest that it is usually better for our political system if Congress simply stays out of the way and lets the agency use its best judgment.

But although I think these functional arguments are virtually decisive against the veto in most areas in which it has been employed, I must acknowledge that those arguments are not as strong in some fields--especially in foreign affairs. Events happen too fast in the foreign arena, and the U.S. response is too dependent on a bewildering variety of variables for us to expect that a statute can always lay out realistic and comprehensive standards in advance--at least if we want to maintain the necessary flexibility. As a substitute, therefore, Congress has occasionally used the legislative veto to provide a more flexible control mechanism.

On these grounds, then, the functional case in favor of the legislative veto is stronger when applied to certain Executive decisions in foreign affairs than it is, for example, in the realm of rulemaking. Nevertheless, it would have been a mistake for the Court to have carved out a foreign affairs exception to its holding in Chadha, for at least two reasons. (I leave aside other possible objections based on a claim of inherent Executive discretion in the foreign policy field.) First, as I indicated above, it was desirable for the Court to issue a decision with clear boundary lines, in order to facilitate future application of the judicial doctrine, and to spare us endless litigation and political sparring over future refinements. The Chadha line is crisp and distinct; a foreign affairs exception would necessarily have rendered it far more vague and uncertain. Secondly, the legislative veto has in reality played a less significant role in the reassertion of congressional authority over foreign affairs than is generally believed. Congress already uses other constitutional controls for the most important restraints, and could apply those control models, if it chooses, in other fields where the legislative veto formerly applied. Let me illustrate by examining the War Powers Resolution and the Arms Export Control Act.

Legislative Vetoes in the Foreign Affairs Field

The widest misunderstanding of the significance of the legislative veto has arisen in connection with the War Powers Resolution (50 U.S.C. § 1541 et seq.) Immediately after Chadha was decided, some commentators worried that congressional control over troop deployment had evaporated. Quite to the contrary, the most important provisions of the War Powers Resolution clearly survive Chadha. The Resolution expressly provides that the President may not introduce troops into "hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances" and keep them there longer than sixty days unless he receives express statutory authority or a declaration of war from Congress. (There are other narrow exceptions allowing extension for up to thirty days if disengagement is extraordinarily difficult, and a further exception if invasion has made it impossible for Congress to convene.) As a result, at least after the initial sixty days, the burden of overcoming legislative inertia is on the President. If he is unable to push express legislation or a declaration of war through the Congress, then he must pull the troops out.

The legislative veto would only have come into play under the War Powers Resolution if Congress wished to insist on removal of the troops before the sixty-day period had elapsed. If Chadha invalidates this veto provision, as I believe it does, then this change certainly represents something of a loss in Congressional control. But in my view, the effect is quite minor--and not only because the period at issue can last at most for a matter of several weeks. More fundamentally, only in the most extraordinary of political circumstances will Congress defy a sitting President who has perceived so grave an international threat that he has introduced troops on his own. Realistically, Congress is not going to rally even a simple majority for a veto resolution unless the President has virtually gone off the deep end, introducing troops in a way clearly and immediately condemned by the overwhelming majority of the public. And if the President's error is that manifest, I submit, Congress not only will assemble a majority to disapprove the troop deployment but also, almost surely, can put together a two-thirds majority to pass, over a Presidential veto, full-scale legislation that cuts off spending for the foreign military adventure or otherwise forces withdrawal of the troops.

For these reasons, I do not believe it is necessary to alter the War Powers Resolution in light of Chadha. The most important protections included in that valuable enactment--the provisions denying the President the benefit of legislative inertia and instead requiring him to secure express legislative approval if the troops are to stay longer than sixty days--remain undisturbed.

The other foreign affairs use of the legislative veto that has claimed the largest share of recent attention is probably the two-House veto of large arms sales, established by Section 36(b) of the Arms Export Control Act (22 U.S.C. § 2776(b)). As you

know, that provision led to rather dramatic votes on the sale of AWACS planes to Saudi Arabia in 1981. In that episode, the House passed a resolution of disapproval, but the Senate, by a narrow vote, failed to concur.

I have done no extensive analysis of the legislative history of that Congressional veto provision, but under Chadha, the courts would probably treat these clauses as severable. If so, Section 36(b) will henceforth function as a "report and wait" requirement. The President must still notify Congress at least 30 days before making final arrangements for any large arms sale transactions, but Congress will be able to block the sale only by joint resolution, subject to presidential veto. The relevant provisions in the Arms Export Control Act apply only to transactions involving dollar amounts greater than $50 million. (Different thresholds apply to sales of construction services and other military equipment.) Arms sales of that magnitude usually constitute major elements of our foreign policy with respect to the country involved, and they rarely go forward without the personal blessing and involvement of the President. For that reason (and in sharp contrast to many other statutes where the President might not have as much of a personal stake in the agency action that Congress seeks to block through a joint resolution), the President is most likely to veto any legislation meant to thwart such a sale. Congress probably will have to put together two-thirds majorities in both Houses if its will is to prevail.

If Section 36(b) remains as a "report and wait" provision, then, this scenario does signify a notable shift in decision-making power and political dynamics affecting arms sales. But Congress has the opportunity to reclaim the power it appeared to have before Chadha, if it chooses. Congress can reach almost the same result by amending the Act to reverse the presumption in case the legislation expressing Congress's will on the sale fails of enactment. Such an amendment would deny the President any general authority to approve arms sales over, say, $50 million--to use the same dollar threshold that appears in current law. The President would then be required to draft and push his own special legislation to authorize each arms sale exceeding that threshold amount. A simple majority in one House could then prevent the sale by defeating the proposed legislation. The burden falls on the Administration to assemble majorities favoring the legislation in both chambers.

Such a scheme is possible. Whether it is a wise change, however, is another question. It probably is not sound unless accompanied by other provisions streamlining congressional consideration of any such special arms sales legislation. If the President is convinced that a major sale is in the national interest, he deserves to be able to secure a relatively prompt floor vote on the necessary legislation, with minimal risk that the bill will be killed in committee or through filibuster. Fortunately, there are models for such streamlining arrangements. The foremost may be Section 601 of the 1976 International

Security Assistance Act (Pub. L. No. 94-329, 90 Stat. 729). Section 601 contains detailed rules for expedited Senate consideration of various kinds of resolutions of disapproval. With a few modifications, this scheme could also be used with respect to resolutions granting approval, and it probably also could be modified to apply in some fashion to consideration by the House of Representatives. Such provisions would assure prompt, full, and authoritative deliberations on any Presidential arms sale proposal.

Beyond such streamlining, if Congress is to alter Section 36(b) to place the legislative onus on the President, it will want to consider whether the threshold should be raised from $50 million, in order to make sure that only the largest and most significant sales are subject to the requirement of special legislation. Congress may also want to except emergency sales and sales to certain countries altogether from this requirement. Current law already exempts emergencies and gives special expedited treatment to sales to NATO countries, Australia, New Zealand, and Japan. Perhaps, after Chadha, the President should retain sole authority to sell arms to those countries (and there may be others that should be added to the list)--subject only to disaproval by joint resolution passed during the "report and wait" period.

Whether you vote for this change in the placement of the legislative burden and where you choose to set the dollar threshold depends, in the end, on your substantive judgment about the risks and merits of arms sales as a component of our foreign policy. If you think such sales are valuable or at least necessary, and that the President by and large will use this tool wisely, then surely you will wish to set a high threshold before the special legislation requirement applies, or indeed you may choose to retain the "report and wait" scheme requiring a joint resolution to disapprove. If, on the other hand, you think that arms sales are a dubious foreign policy tool carrying a high risk of promoting conventional arms races, then you will likely favor some version of the special legislation requirement I have sketched out, probably applicable at a dollar threshhold set as low as possible. Ultimately this is a political judgment that needs full airing in the Congress.

The Range of Alternatives

Let me conclude with a few more general observations on the opportunities for Congressional action in order to assure adequate checks on the Executive Branch, now that the legislative veto has been ruled unconstitutional. Some of these apply in particular to foreign affairs legislation; others apply more broadly. Above all, I want to emphasize that Congress has available a wide variety of possible responses, each with different implications for policy decisions and varying potential for disruption of effective governance. Congress should resist the temptation to seize on a single device as a way of checking the Executive Branch in this new climate. It should instead

examine each policy context carefully and choose the control mechanism best suited to that realm.

Oversight. In some fields, the best check will derive from redoubled efforts to assure that oversight is carried out relentlessly and effectively. Some commentators who favored the legislative veto argued that the device should be held valid because it achieved results that really were not so different from what Congress has been accomplishing all along, through its regular oversight mechanisms and through ordinary contacts of the agency with Congressional members and staffs. I am skeptical about this claim in its strongest formulations, but there is much truth to it with respect to the regular business of the departments and agencies. To the extent this observation is true, you should certainly make the most of it. Agencies and departments are acutely aware of the need for continuing Congressional favor in order to secure passage each year of the necessary authorizing and appropriations legislation. In most cases, Executive officials will take appropriate cues from the signals that Congress sends forth during oversight hearings.

Disapproval legislation. Beyond enhanced oversight, the possibilities for responding to Executive missteps through full-fledged legislation are actually more potent than many of the proponents of the legislative veto have made it sound. Their objections to having to rely on statutory responses have usually embraced two themes. First, they have asserted that the regular legislative process is too cumbersome to allow for such statutory response on the necessary scale. Secondly, they allege, disapproval legislation will meet with a Presidential veto, so that the Congress must always muster a two-thirds majority in order to have its will carried out. Both claims are exaggerated.

First, consider the legislative cumbersomeness argument. Legislative veto proponents often made it sound as though the Congressional response to disfavored Executive action would have to take the form of a separate piece of legislation. In such a case, the whole complicated legislative ritual indeed would have to be initiated and pursued to a conclusion--referral to committee, days of hearings, the drafting of a committee report, the agonies of a floor vote, and eventual conference with the other chamber. But clearly this is not necessary. Unless Congress wants to act with extraordinary speed, the legislation correcting the agency misstep can simply be added as an amendment to other relevant legislation already making its way through the process. In these days when most departments and agencies are required to renew their authorizing legislation annually, Congress has already taken upon itself the "cumbersome" duty of passing, each year, substantive legislation--not just appropriation bills--affecting the basic legislative authority of the agencies and departments. An amendment to the authorization bill, modifying or nullifying earlier rules or practices, would be in order. In short, a member who wishes to correct what the agency has done need not crank up the whole legislative machinery anew, but may simply attach appropriate measures to legislation

that is already on the move.

There is still the possibility that the President will veto disapproval legislation, thus requiring a two-thirds vote by each House of Congress to override. Now that Chadha has subjected all Congressional correctives to this requirement, Presidential vetoes definitely will block some legislative disapprovals that otherwise might have taken effect. But in my view, Presidential vetoes are far less likely than some have feared. In the first place, many Congressional disapprovals will be directed toward the independent agencies. The President was not directly responsible for the initial agency action, and he may even disagree with the result the agency reached. Even if he agrees, will have to decide whether it is worthwhile to spend the political capital necessarily involved in vetoing legislation and working to have that veto sustained. Beyond this, even if the action initially derived from a department directly accountable to the President, it is not inevitable that he will veto Congressional disapproval legislation once it is clear that Congress has become that upset with what his agency has accomplished. Again, he will have to decide about the prudent use of political capital. Vetoes will not be automatic. Only on those topics that personally engaged President's authority and prestige before Congress ever took up the matter should we expecte near-certain vetoes. But in that setting as well, Congress can improve its odds, for it need not send up its disapproval measure separate and exposed--highly vulnerable to Presidential veto. Most such disapprovals can be attached to other legislation, for example annual authorizing legislation, that the President will want to see enacted.

I offer one additional comment on the legislative cumbersomeness argument. To the extent that Congressional procedures are cumbersome, Congress controls its own procedures and could streamline them. But care is in order here. A few of the streamlining proposals advanced to date carry the seeds of their own significant problems. For example, the so-called Levin-Boren bill includes measures to simplify and expedite the Congressional consideration of joint resolutions of disapproval. On its face, this approach is not necessarily troublesome. The Levin-Boren bill, however, is directed, not at yes-or-no questions like arms sales, but rather at agency rulemaking. More significantly, at least in some versions of the bill, the only kind of legislation that can benefit from its streamlining provisions is a bare-bones resolution stating simply that a certain set of rules is disapproved.

Whenever the agency has had to face a complex choice among multiple options before it acted--as is almost always the case with rulemaking--this sort of unadorned negative from Congress is most unhelpful. Too often such a resolution simply represents Congress's yielding to the intense pressures of the interest group that was most significantly aggrieved by the agency action. By simply disapproving, Congress refrains from telling the agency which other powerful interest groups it ought to offend when it goes back to the regulatory drawing-boards. Responsible legislative action, it seems to me, requires Congress not only to veto

one version, but also to enact specific guidance as to what the agency should do instead.

If the objection is heard that Congress hasn't time to immerse itself in the details sufficiently to pick an alternative, my response is to question the premise. If Congress has not already descended into the details enough to be quite familiar with the agency's choices and to see its way clear to a superior option, then it probably has no business simply blocking one avenue for agency action. Any streamlining of procedures that serves to channel Congressional response away from affirmative statutory response and toward mere negation presents these risks. Such procedural changes should generally be avoided.

Reversing the burden of legislative inertia. In a few areas, requiring full-fledged legislation to disapprove may be judged inadequate to the particulars of the task. I believe such areas are rare, but I have suggested that arms sales may constitute one such field. When that is the judgment, Congress can regain authority functionally similar to the one-House veto by withdrawing the general Executive authority. As I have indicated, such a change would force the President or agency to seek specific legislation before proceeding. The War Powers Resolution, in essence, already imposes such a requirement, applicable at the point where troops have been deployed for sixty days. The Impoundment Control Act (31 U.S.C. § 1401 et seq.) also uses a version of this approach, not as to all impoundments, but with respect to the more potent kinds of impoundment known as "rescissions." The President can only propose rescission legislation. If it fails to pass within forty-five days, he must proceed with the spending.

This approach should probably be sparingly used, lest the Congressional agenda become inordinately crowded with Executive requests for such special legislative authorizations. It may be that such an approach makes sense only in those areas where Congress can anticipate fairly routine Presidential veto of any ordinary disapproval legislation and where Congress still believes that an effective, immediate check on the Executive is of high importance. And on those occasions, as I have indicated, Congress will often want to provide for streamlined Congressional deliberation on the special approval legislation.

Conclusion

I hope the Committee will find these general reflections useful as Congress responds to the Chadha decision. I do urge that each former use of the legislative veto be examined singly and with care, in order to select prudently among the many possible substitutes that can still be provided consistently with the Constitution.

"CHADHA" DECISION IMPOSES BICAMERAL PRESENTMENT REQUIREMENT ON LEGISLATIVE REVIEW AND/OR VETO

Chairman ZABLOCKI. As I understand your presentations, gentlemen, it appears that when there is a proposed bill and it is not adopted by either House, it is a veto.

Mr GRESSMAN. Right.

Chairman ZABLOCKI. Those who argue against a concurrent resolution legislative veto point out the difference between a proposed bill, a proposed law, and an enacted law. After enacting and delegating to the administration or the regulatory agencies to carry out and to interpret the provisions in the law or act, Congress has indeed abdicated some of its authority.

Therefore, it appears that the only recourse would be to deny funding, which is the power of the purse, and/or congressional oversight and review, which is cumbersome Congress would not be able to carry such oversight out to the degree necessary in order to correct inequities in the implementation of a law.

Would you care to comment? Do you see a difference between a veto on a proposed bill and a legislative veto on an enacted bill, an enacted law through which Congress has already transferred its authority to what you call the fourth branch of Government?

Mr GRESSMAN. Do you mean a veto by a concurrent resolution?

Chairman ZABLOCKI Yes, by concurrent resolution.

Mr GRESSMAN. Not a joint

I think that that reflects what is a longstanding confusion particularly among the commentators preceding the *Chadha* case, that is, the obvious distinction between the two levels of legislation.

When you enact a new statute, you are acting at the primary level of legislative activity, which obviously has to be approved, if not vetoed by the President. But within the statute you have the whole secondary level of legislation by delegation to administrative agencies or executive branch officials That is what we call quasi-legislation

I do not believe that it is necessary, if Congress takes care, totally to abdicate all of that secondary level of quasi-legislation to those agencies You do abdicate, in a sense, when you give some of these agencies, like the SEC, final authority to promulgate rules or regulations that have the effect of law. There is no provision in the Securities Act for any kind of congressional review, let alone veto, of those provisions. That is perfectly permissible. It is done with many of the old line agencies.

On the other hand, I repeat that the Supreme Court in the past has said that you don't have to abdicate total authority to the agency at this sublevel of quasi-legislation within the ambit of a statute. It all depends upon the limitations and the conditions that are set forth in the statute.

If you make it crystal clear that the agency or the executive shall have limited authority merely to propose, not to finalize, then the Supreme Court opinions are innumerable that say that the agency cannot go beyond the authority that has been thus carefully limited and that the agency must respect the conditions that Congress lays down.

Once you accept the fact of life that there is this secondary level of legislation by delegation, then I think that there is no conceptual difference between one House saying no to a quasi-legislation that has been proposed by the agency pursuant to its statutory delegated authority and, on the other hand, one House saying no to a bill that is proposed in the Congress. As you know, that happens innumerable times, virtually every week.

I think that that reflects what is the basic confusion that has infused the *Chadha* rationale, as well as most commentaries that I have read on the subject. The essence of the *Chadha* rule is that they have now imposed the bicameral/presentment requirements of article I upon any kind of legislative review and/or veto, if you will, of this kind of secondary quasi-legislative authority.

REVIEW OF DELEGATED AUTHORITY ACCOMPLISHED BY JOINT RESOLUTION OF APPROVAL OR DISAPPROVAL

Congressional review of quasi-legislative proposal can be most easily accommodated by simply requiring that such review of delegated but limited authority be in the form of a joint resolution. I would suggest it is more politic to make it a joint resolution of approval of whatever the President or the agency proposes, rather than a joint resolution of disapproval.

I think you might have more difficulty getting the President to agree to a disapproval of his own action that he has proposed, whereas the joint resolution of approval has with it the built-in procedural safeguard that one House, by simply saying no, puts an end to the matter.

Chairman ZABLOCKI. Professor Gressman, are you suggesting that there should be joint resolutions of approval or disapproval?

Mr GRESSMAN. No. But I am not sure enough about the procedural rules of the House, frankly, to know what effect a negative vote in the House on a joint resolution has.

Chairman ZABLOCKI. The reason for my question—and I will also ask the opinion of Professor Martin—is, for example, under the Arms Export Control Act, the concurrent resolution is a resolution of disapproval.

Mr. GRESSMAN. Right.

Chairman ZABLOCKI. If we changed that provision in law to a joint resolution, would it be preferable to have a joint resolution of approval of a proposed sale or a joint resolution of disapproval?

Mr. GRESSMAN. I think constitutionally now you could do either one. As I said, I think it is more politic and more practical to have it in the form of approval rather than disapproval.

CONGRESS COULD WITHDRAW AUTHORITY OF EXECUTIVE TO SELL ARMS OVER A SPECIFIED DOLLAR THRESHOLD

Chairman ZABLOCKI. I believe, Professor Martin, you mentioned in your statement that it would be constitutional for Congress to set a dollar ceiling about which any proposed arms sales would have to be approved?

Mr. MARTIN. That is right. You could certainly restructure the Arms Export Control Act to set that sort of a dollar threshold. If you use $50 million, as is the case in the current legislation, it

would amount simply to withdrawing authority from the executive branch to go ahead on its own with an arms sale of that magnitude.

You could require them to report a sale under similar provisions to the ones we have now, and then put the legislative burden on the President to have Congress pass a joint resolution of approval in those circumstances.

If you do that, I think you would want to consider carefully whether to stay with the same dollar threshold and also consider whether there might be other specific countries that could be excepted. I say this because that requirement could become pretty burdensome, for this committee and the Congress, to look at each one of those proposed large arms sales and have to go ahead with affirmative legislation if the sale is to be approved

If I could comment more broadly, certainly there are possibilities for withdrawing Executive authority or agency authority in certain defined circumstances and requiring the agency to come back to Congress, requiring the agency to take on that burden of legislative inertia, and to get affirmative approval.

In some circumstances that approach will make sense. Where it is used, it will be functionally similar to a one-House veto, because if one House doesn't go along with the proposed bill, the agency or the department won't have its will carried out .

I don't think you want to do that in every setting. In most of the settings involving rulemaking and other decisions, Congress simply isn't going to have time to look at all the proposals that could come along that way. But in certain well-defined circumstances—and the arms sales field strikes me as a very plausible candidate—you may wish to shift the burden of legislative inertia in that fashion.

Chairman ZABLOCKI. Mr. Levine?

"CHADHA" DECISION DOES NOT AFFECT ABILITY OF CONGRESS TO IMPOSE CONDITIONS PRIOR TO THE DELEGATION OF AUTHORITY

Mr. LEVINE. Thank you, Mr Chairman.

If it is as simple to overcome the difficulties imposed by the *Chadha* case, as both of you gentlemen imply that it is with this resolution of approval, I am not sure that I read *Chadha* accurately. I would like to explore this with you for a moment or two.

Professor Gressman, I think, summarized well the essence of the *Chadha* holding, which was that it imposed the bicameral presentment requirement of article I on each legislative act.

How is it consistent with that holding and that requirement to attempt to pass a resolution of approval with one House rejecting that resolution and, therefore, never presenting the resolution to the President pursuant to the presentment clause, and, in essence, developing an inverse legislative veto simply by altering the form of the resolution?

It seems to me that that might be viewed by the court as elevating form over substance and not complying with the holding of the *Chadha* opinion.

Mr. GRESSMAN. I don't read it as you suggest because frankly I don't think the court thought through this far in terms of what kind of legislation would be appropriate. Again, assuming that you

are going to impose the bicameral/presentment requirements at what I call the secondary level of quasi-legislation, I don't read *Chadha* as dealing with, let alone invalidating, a statute that says that the Executive shall have so much authority up to this point, at which point he must recommend or propose that some additional action of the Executive be approved by Congress by joint resolution.

There is nothing in *Chadha* that says that such legislative procedure carries with it any constitutional violation or inconsistency. All *Chadha* has said was that Congress must act in a legislative fashion; that is, by bicameral/presentment procedures.

What happens when Congress executes that full legislative authority, be it by a proposed new statute or be it by a joint resolution of approval, which is practically indistinguishable from a new statute? There is nothing in the Constitution or in the *Chadha* ruling that says that one or both Houses must accept a proposed change in the law.

Mr LEVINE. You are essentially saying, I take it, that Congress, by moving toward this procedural route, would be withholding some of the delegation of authority that in the prior procedural framework that we have used we had granted; that instead of having a condition subsequent to the granting of authority, we would still have as a condition precedent a particular action that needs to be taken prior to the granting of the authority.

Mr GRESSMAN. I think that is absolutely correct.

PRESENTMENT ONLY APPLICABLE TO AUTHORITY DELEGATED BY CONGRESS

Mr. LEVINE. Let me explore this in one followup question, and then I would like Professor Martin's response as well

How does that then deal with the presentment issue that is raised by *Chadha*?

Mr. GRESSMAN. The presentment comes only after both Houses have adopted or approved some kind of bill or resolution If the House says no or the Senate says no, it is never presented to the President. That is our constitutional system. That is what article I, section 7 is really all about.

Mr. LEVINE So, there would be the presentment of that delegation of authority granted but never the presentment of that delegation of authority that Congress has continued to withhold?

Mr. GRESSMAN. That is true.

Mr. LEVINE. Thank you.

Professor Martin?

RESTRUCTURING OF ARMS EXPORT CONTROL LEGISLATION MAY BE POLITICALLY DIFFICULT

Mr. MARTIN To respond to your first question, I didn't mean to suggest it would necessarily be a simple thing to respond to *Chadha* in that way. It is simple conceptually to revise the statutes in the fashion that we have described. It may be very difficult politically to do it.

In the arms export control context, first there would have to be full-fledged legislation that would change 36(b), and that would

have to be passed by both Houses. It would then go to the President, and I think a veto might be very likely.

You could sneak up on it, I suppose, if that happens, by first enacting sunset provisions and then the next time around only granting the delegated authority up to a certain dollar threshold. In any event, that is a possibility

Once that has happened, then it is up to the executive department to come forward with the legislation that authorizes a larger arms sale, subject to the same hazards that any new proposal is subject to.

Mr. LEVINE. Thank you.

Chairman ZABLOCKI. Mr Weiss.

CONSTITUTIONALITY OF WAR POWERS PROVISION REQUIRING CONGRESSIONAL APPROVAL FOR CONTINUED COMMITMENT OF TROOPS NOT ADDRESSED BY "CHADHA"

Mr. WEISS. Thank you, Mr. Chairman.

Professor Martin, in your discussion of the War Powers Resolution you said that the most important protections included in that law are the provisions that deny the President the benefit of legislative inertia and that "* * * require him to secure express legislative approval if the troops are to stay longer than 60 days remain undisturbed." Your premise is that that is a perfectly valid and constitutional provision.

Yesterday, when we had Secretary Dam before us, his position is somewhat like yours but vastly different, really. He says,

> The third operative part of the resolution requiring positive congressional authorization after 60 days does not fall within the scope of *Chadha* Its constitutionality is neither affirmed, denied, nor even considered in the *Chadha* decision
>
> As you know, the executive branch has traditionally had questions about this requirement of congressional authorization for Presidential disposition of our armed forces, both in light of the President's Commander in Chief power and on practical grounds Congress, of course, has had a different view I do not believe that any purpose would be served by debating these questions here in the abstract

They take the position that no, it hasn't been changed by *Chadha,* but they didn't think it was constitutional to begin with and they aren't about to adhere to it. If you follow what has been happening with the American advisers in El Salvador, there certainly has been no inclination on the part of the President to request congressional approval through legislation to keep those military advisers in a situation which by anybody's rational determination is, in fact, in a state of hostility.

Mr. MARTIN. There are certainly several questions there. I am aware that the executive branch contested very strongly both of those provisions in the war powers resolution: both the one that required a pullout after 60 days unless there was congressional action and the concurrent resolution provision

I agree with the Deputy Secretary of State that *Chadha* didn't touch the 60-day pullout provision. Ultimately that question may be decided in favor of the executive branch. In my view now, however, based admittedly on a small array of judicial authority on the subject, Congress was within its constitutional powers under the "necessary and proper" clause to channel the use of any inherent executive power under the Commander in Chief clause. Congress

did so, in my view, quite responsibly, drafting the war powers resolution in that fashion.

If the President can't persuade majorities in both Houses of Congress after 60 days that the troops ought to stay there, then it seems to me a reasonable reading of the Constitution, fleshed out by the war powers resolution, that he should be required to pull them out.

It is true there is still very much of a contest on these questions. It is hard to envision exactly how that might lead to an authoritative judicial resolution under the political question doctrine and so forth.

REQUIREMENT FOR POSITIVE CONGRESSIONAL AUTHORIZATION UNDER WAR POWERS RESOLUTION PLACES BURDEN ON CONGRESS

Mr. WEISS. That is right. As a matter of fact, the gentleman from Michigan, who was here earlier, Mr. Crockett, and I and a number of our other colleagues are parties to an action under the war powers resolution and some other provisions, to have the President withdraw those military advisers.

At least in the first instance the court has held that under the political powers doctrine, if we wanted to, we could take steps We have indicated no inclination at all to take those steps. Indeed, we do provide funds for those advisers. So, it puts the burden on Congress, really, even though the statute, in your understanding, seems to place the burden on the President.

How do you overcome that kind of judicial siding with the executive by a negative? The Congress is then asked to do something beyond what the language of the legislation seems to place as a burden on the President.

CONGRESS RETAINS POWER THROUGH THE APPROPRIATIONS PROCESS

Mr. MARTIN. There are other means that Congress could use if a majority were persuaded that this was an invalid use of troops. Cutting off funds is one. Obviously that is cumbersome and involves a big political fight.

I don't think the judicial branch has necessarily sided with the executive on the merits. It simply said this is not something appropriate for judicial resolution, at least not in the current posture. That still is a little different.

I understand your frustration. I am generally familiar with the lawsuit. The administration isn't saying, for whatever it may be worth, that this is something to which that 60-day requirement of the war powers resolution applies and we are going ahead anyway. They are saying that, under their construction of the war powers resolution, this isn't a hostility situation—if I understand their position correctly. If they are right then that 60-day requirement doesn't apply, although they still have to report and consult.

The theory of the executive action is not just a blatant overriding of what Congress has provided in the resolution. It is instead an argument over construction. It would be nice in many circumstances to have an authoritative resolution by the judicial branch, but even if the judges remain reluctant to do that under the politi-

cal question doctrine or standing doctrine, Congress does have other means of dealing with the President's actions.

Mr. WEISS. But not as part of the war powers resolution.

Mr MARTIN No, not directly under that. It would have to be by cutting off funding or otherwise altering the authorization.

Mr. WEISS. Thank you.

Thank you, Mr. Chairman.

STANDING OF PRIVATE PARTIES TO BRING SUIT BASED ON "CHADHA" DECISION

Chairman ZABLOCKI. It is obvious that the problem that has resulted in the wake of *Chadha* can best be resolved by substituting a joint resolution for a concurrent resolution, wherever such a provision appears in the legislation Whether it should be a joint resolution of approval or disapproval, that judgment can be made by the Congress when the occasion occurs. I agree with Professor Gressman that with the normal procedure of legislation a joint resolution of approval would be preferable.

Professor Gressman, in your written testimony, on page 5, you refer to challenges by private citizens after *Chadha.* You state "* * * that a complaining citizen has standing to bring such a challenge, without regard to immediate or demonstrable injury, provided only that he might benefit in the future had the governmental rule not been vetoed."

Does that mean that defense contractors will now have standing to sue the U.S. Government in situations where the President decides to rescind arms sales contracts because Congress objects through the existing legislative veto?

Mr. GRESSMAN My own answer to that is no, he should not have standing The answer is complicated however, by the fact that in the two administrative regulation cases that were decided in the District of Columbia circuit and summarily affirmed by the Supreme Court, we had private plaintiffs whose only claim to standing, to challenge the veto, lay in the fact that the plaintiffs were prospective beneficiaries of an administrative regulation that had never become law.

Take the Federal Trade Commission used car rule as a good example. The plaintiffs in that case were consumer groups composed, they said, of an indefinable number of individuals who might someday be in the market to buy a used car, that they would benefit from the proposed Federal Trade Commission rule regarding placing a sticker on the window of the car to show what defects it might have had.

The District of Columbia court approved that kind of standing. There was no immediate or demonstrable injury in fact, only a loss of an expectation of a benefit if the rule were to become effective in the future. Therefore, the congressional act of veto precluded those benefits from ever accruing.

I know Mr. Brand made the statement the other day, in his testimony, that he thought a defense contractor, as you mentioned, might have standing to challenge some kind of veto action on the basis of lost profits that he might have made had Congress not vetoed a proposed sale of military equipment, let's say.

I totally disagree with this judicial rationale, but I can only raise this specter, and I think that is all Mr. Brand intended to do. We raise it because of what happened in the Federal Trade Commission case.

That is one of the most distressing aspects of the *Chadha* decision and the subsequent summary affirmance of the administrative regulation cases, that is, they seem to have abolished the ordinary standing rules or at least created a rule of standing that says that if you as an individual plaintiff can point to some benefit that you might achieve had Congress not vetoed, you have standing to challenge the veto.

I think that is conceptually and totally wrong, but that is what we are faced with. We are faced with a lot of these threshold problems that the Supreme Court either brushed aside or gave rather summary treatment to. These arguments were all presented to the court, but they saw fit to ignore them.

Chairman ZABLOCKI. Professor Martin, would you care to comment on that same question?

"CHADHA" DECISION ALLOWS PRESIDENT TO TREAT CONCURRENT RESOLUTION AS ADVISORY

Mr. MARTIN. Yes; I would. The law of standing is sufficiently complicated and perhaps confused that it is always hazardous to venture a prediction in those circumstances. A defense contractor might well be held to have standing under the cases that Professor Gressman mentioned, but I don't consider that a very major worry at this point after the *Chadha* decision.

I am trying to think through the scenarios in which such a lawsuit might come about. The law is still on the books providing for a concurrent resolution. I guess we are assuming a situation where the President initially decides to issue a letter of offer and he notifies Congress to that effect and Congress passes a concurrent resolution during the stated period of time. Under *Chadha,* the President would be entitled to treat that resolution as purely advisory, as equivalent to a sense-of-the-Congress statement

He might say "I am persuaded by the reasons that came forth in that debate and, therefore, I am not going to issue the letter of offer." It is basically his decision. I don't think that the defense contractor would have any legitimate challenge in those circumstances.

If the President says, instead, well, thank you very much for your advice in the form of this concurrent resolution, but under *Chadha* I am not bound by it—I think he would be right about that interpretation—and decided to go ahead with the sale, there may be strong political consequences for him, but obviously the defense contractor is not going to complain.

After *Chadha* there aren't any likely circumstances where a defense contractor is going to be able to say it was the invalid legislative veto per se by concurrent resolution that interferred with his sale. Denial either will be an independent decision of the President or else the President will go ahead with the sale.

Chairman ZABLOCKI. Mr. Weiss, do you have a question?

EFFECT OF REPEAL OF WAR POWERS RESOLUTION ON CONGRESSIONAL PREROGATIVES CONCERNING WAR POWERS

Mr. WEISS. Thank you, Mr. Chairman.

Yesterday I asked Secretary Dam and Mr. Schmults the basic question involving the war powers prerogatives of the Congress under the Constitution. In essence, Mr. Dam's position was that that was really an academic issue. He didn't care to get into it. Since you two are academicians, I thought that maybe you would like to get into it.

I recall at the time the war powers resolution was adopted there was some serious discussion as to whether in fact Congress was not giving away some of its inherent constitutional powers by adopting the resolution even though at the same time, Congress was trying to put a reign on the President in exercising some of those powers.

I wonder what your thoughts are on that issue and also what would be the effect if, in fact, Congress were simply to repeal the war powers resolution? Is that a way of addressing the problem?

Mr. MARTIN I don't think that would be a good way of addressing the problem. You mentioned that it is an academic question, but I think even academic lawyers feel more comfortable talking in areas where there are a lot of Supreme Court cases or lower court cases that help you along and provide the basis for your argument.

Here, obviously—for obvious reasons, understandable reasons—disputes over the war powers have not resulted in a lot of litigation. There have been some important cases, but they don't resolve many of the difficult issues. I guess that is the sense in which it is an academic question.

The best I think one can say is that the framers gave important elements of war powers both to Congress and to the President, and their mutual implementation has been worked out over time in various fashions based on various events.

There have been many instances where the President has taken broad initiatives on his own and generally, because it was in response to a clear threat, eventually Congress caught up and ratified it.

That was the situation in the Civil War, for example. In the *Prize* cases, a narrow majority of the Supreme Court approved a strong measure of inherent executive authority to respond to emergencies. That case can be distinguished or narrowed to its facts, perhaps, but it is some indication of support for a claim to some inherent executive authority. We are fortunate that usually such questions are resolved in practice, by accommodations among the branches, and don't provoke judicial tests.

Having said all that, I think it was very useful for Congress to exercise its authority under the "necessary and proper" clause to define and channel whatever inherent executive powers the President might have as a result of earlier practice and earlier cases, like the *Prize* cases, and to set out specific procedures and guidelines in the war powers resolution.

If that Resolution is simply repealed, there still may not be a judicial test of any use of troops. The political effect of repeal may make it easier for the President to argue that he has a wider field

for independent action under his Commander in Chief powers. So, I think repeal would not be advisable

Mr WEISS. Thank you.

Professor Gressman?

PRESIDENTIAL AUTHORITY HAS ACCRUED INFORMALLY UNDER IMPLIED POWERS AS COMMANDER IN CHIEF

Mr. GRESSMAN. I think I essentially agree with Professor Martin. I don't think Congress gave away anything in the war powers resolution. I think you set the guidelines for recognizing, if not delegating, certain functions and filling in through the "necessary and proper" clause, the somewhat limited powers in the Constitution that the President has over foreign affairs.

The Constitution doesn't speak of foreign affairs anywhere. The President has very little vested specific authority. He is Commander in Chief of the Army and Navy, provided Congress gives him an Army and Navy to command The basic power to declare war and to maintain an Army and Navy are, of course, within the vested article I authority of Congress.

Most of the Presidential authority in foreign affairs has accrued over the years under the rubric of his implied powers, which really means that he has seized certain areas of foreign affairs which he considers essential. There is really very little in the Constitution that specifies when the President can go beyond being the Commander in Chief or whether he can take over the entire field of foreign affairs

Again, I suggest that all of that has occurred informally through strong Presidential leadership. Congress has either acquiesced by silence or has approved by legislation. I think it is well and good that Congress on occasion either take back or set some guidelines for the President to follow in executing what few powers he has in this area; that is, specific powers.

COURTS UNLIKELY TO ADJUDICATE EXECUTIVE-LEGISLATIVE DISPUTE OVER WAR POWERS

Also, this whole area is overlaid with the political question doctrine It is very difficult, if not impossible, to expect that the courts will ever enter into a dispute between the President and the Congress over the procedures or the powers that Congress may or may not delegate to the President in the foreign affairs area.

The Court has traditionally stayed away from that because it is simply not within its judicial competence. There are no guidelines in the Constitution to guide the courts in trying to rearrange the war powers as between the President and the Congress.

I think that this is a very unique field. Again, I suggest that maybe this is one context where some of the normal legislative procedural rules laid down in *Chadha* might not apply. If they were not applied, it would be very difficult even for a defense contractor to protest an arrangement of procedures as between the executive and the legislative branches respecting the Arms Control Act or whatever. I don't suggest you try it that way, and I think you would be more comfortable going the joint resolution of approval route.

"CHADHA" DECISION REQUIRES CONGRESS TO DEFEND CONSTITUTIONALITY OF ITS ACTIONS

I might also add this one thought: One of the rather subtle effects of the *Chadha* decision has been to make Congress a litigating body with respect to its relationships with the executive branch

The real problem in *Chadha,* the real parties in issue in *Chadha,* were the executive and the legislature. The Court says, for the first time in history that when the executive has a constitutional dispute with the Congress, Congress is the appropriate party to defend the constitutionality of its actions

I certainly have been honored to represent the House of Representatives in this litigation, but I have always had a feeling that the House and the Senate have been put in an awkward position of having to defend themselves against executive challenges to congressional action. Congress wasn't set up to do that job It is a legislating body, not a litigating body.

I cannot foresee all the implications of what this is going to mean, except that whether it be in foreign affairs or in other areas of congressional action, Congress is going to have to be prepared to hire counsel to defend itself when the executive branch takes an opposing and challenging position.

Mr. WEISS. Thank you very much.

Thank you, Mr. Chairman.

THE WAR POWERS RESOLUTION DOES NOT CONFER ADDITIONAL WAR MAKING POWERS UPON THE PRESIDENT

Chairman ZABLOCKI. I wish to thank the gentleman from New York for asking the question As a principal sponsor of the War Powers Act, I appreciate the answers our witnesses gave.

The concern that some Members have is that the war powers resolution conditionally grants the President the authority to declare war for 90 days. That is not the intent of the war powers resolution at all. As a matter of fact, as you have stated, the President didn't get any more authority from the resolution than he already had

To make that very clear in the War Powers Act, section 8, states, "Nothing in this joint resolution shall be construed as granting any authority to the President with respect to the introduction of U S. Armed Forces into hostilities or into situations where any involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution."

To repeal the War Powers Act I think would be a grievous error. We have tried through the act to recoup some of the prerogatives of the Congress. The Constitution clearly states that only Congress can declare war, and the War Powers Act was as a result of confrontations we have had with the executive branch After undeclared wars, the Korean war, the Vietnam war, we must let the President know that we are and should be involved. Under the Constitution we have that right and obligation.

If I may just make one final comment. In your testimony today and your prepared statement, which I am sure will be carefully read and digested as we deal with this subject that has suddenly dropped into our lap, I, like you, agree that the *Chadha* decision

has not really blown everything to hell. In one sense the *Chadha* decision has been of some service to Congress because I think it is going to make Congress more aware of its legislative reponsibilities.

In the final analysis we have the last word During these hearings, as I said in my opening statement, we were assured that the executive branch is not going to exploit their position versus the Congress that may emerge from this decision.

"CHADHA" MAY NOT ADDRESS CONSTITUTIONALITY OF ALL LEGISLATIVE VETO PROVISIONS

It is interesting in your prepared statement, Professor Gressman, that you suggested in some areas of existing law the concurrent resolution provisions may be constitutional and meet the tests of *Chadha.*

I would ask both of you—first of all I will ask Dr. Martin—do you agree with Professor Gressman that in the existing law some of the concurrent resolution veto provisions may be constitutional?

Mr MARTIN. I don't think I do agree with that It is conceivable there may be an area that Professor Gressman has in mind that I haven't thought of where it could still work. But I read the *Chadha* decision to say that if congressional action has legislative effects—alters the rights and duties of people outside the legislative branch—it has to be done by statute, and a concurrent resolution isn't enough.

Chairman ZABLOCKI Perhaps I would ask Professor Gressman to supply for the record, a list for the committee the existing legislative vetoes in the foreign affairs area that you feel would be constitutional, and why you believe so

Mr GRESSMAN. I think I did address one possibility, in terms of the Arms Export Control Act, toward the end of my written statement, where I suggest that maybe in the appropriations area of foreign affairs, such as H R 2992, where the veto might still be constitutional.

ARMS EXPORT CONTROL ACT MAY BE AMENDED TO REQUIRE JOINT RESOLUTION OF APPROVAL ON ARMS SALES

Chairman ZABLOCKI. Professor Martin also stated in his assessment of the Arms Export Control Act that we could put a dollar limit, a ceiling, on proposed arms sales. Any arms sales above the ceiling would be vetoable by Congress

Were you eliminating the veto by concurrent resolution?

Mr MARTIN. Yes, I am. I was describing a possible amendment to the underlying act, which of course would have to be passed by full legislation and signed by the President or passed——

Chairman ZABLOCKI A joint resolution.

Mr. MARTIN. Yes. If that was set up, then it would be possible to require a joint resolution to approve rather than the current situation, where a joint resolution or other kind of full legislative measure is required to disapprove.

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[1] The information referred to appears in app 2

Chairman ZABLOCKI. In closing, Professor Gressman, I want to thank you for your offer to help and assist this committee in its future deliberations as we go through the process of correcting legislation, if necessary.

On behalf of myself and my colleagues, I certainly want to thank you, Professor Martin and Professor Gressman, for coming here this morning Your testimony was very helpful I am sure we will find solutions, whether by substituting joint resolution wherever the provisions of law now provide for a concurrent resolution, or whether we have a greater impetus through stricter oversight.

In my opinion, as long as the executive branch will abide by what they said yesterday, I don't think there will be a need to rewrite our legislation. Thank you very much, gentlemen.

The committee stands adjourned subject to call of the Chair.

[Whereupon, at 12·25 p.m. the committee adjourned, subject to call of the Chair]

APPENDIX 1

MEMORANDUM FOR THE ATTORNEY GENERAL CONCERNING EFFECTS OF IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA ON EXISTING LAWS

Washington D C 20530

JUL 15 1983

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Effects of Immigration and Naturalization Service v. Chadha on Existing Laws

You have requested a comprehensive analysis of the effect of the Supreme Court's decision in Immigration and Naturalization Service v. Chadha on existing statutes of the United States. As a partial response to this request, we have prepared the attached inventory of currently effective statutes that contain legislative vetoes. Because we have organized this list by public law number, some of the items refer to multiple legislative veto provisions in the same title of the U.S. Code, or to provisions included in separate titles. We have included at the conclusion of the inventory two indices listing the 126 public laws and the 207 separate sections that are described in the inventory. */

We have compiled this information from material contained in an appendix to Justice White's dissenting opinion in Chadha, the briefs filed in Chadha, research published by the Congressional Research Service, information furnished to us by Executive Branch agencies and departments, a computer printout of statutes containing legislative vetoes that was made available to us by the General Accounting Office, and our own research. In the course of preparing this compilation, we have discovered that these sources include, to various degrees, statutory provisions that are not legislative veto devices because they do not, on their face, authorize the Houses or Committees of Congress to take action altering the legal rights of Executive Branch officials or other persons, and legislative veto devices that are no longer legally effective. We have not included such provisions in the following inventory.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

*/ To our knowlege, this inventory is comprehensive. It is entirely possible, however, that we have not identified every legislative veto provision that is currently effective. We will update this inventory to include any additional provisions that we identify or that are brought to our attention.

The following is a compilation, by public law number, of statutes in effect as of July 15, 1983, that contain legislative veto provisions. It has been prepared for the use of the Attorney General by the Office of Legal Counsel, Department of Justice. The list is drawn from material contained in an appendix to Justice White's dissenting opinion in Immigration and Naturalization Service v. Chadha, No. 80-1832 (June 23, 1983), research published by the Congressional Research Service, information furnished to the Office of Legal Counsel by Executive Branch agencies and departments, a computer print-out of statutes made available to the Office of Legal Counsel by the General Accounting Office, and research by the Office of Legal Counsel.

While the compilation is as complete as possible, there may be statutes or discrete provisions containing legislative vetoes that have not yet been identified by the Office of Legal Counsel or by the various agencies. This inventory will be updated periodically to include any such additional provisions.

July 15, 1983

Compilation of Currently Effective Statutes That Contain Legislative Veto Provisions

I.

FOREIGN AFFAIRS AND NATIONAL SECURITY

A. War and National Defense

WAR POWERS RESOLUTION, Pub. L. No. 93-148, § 5, 87 Stat. 555, 556-557, 50 U.S.C. § 1544 (absent declaration of war or specific statutory authorization, President may be directed by concurrent resolution to remove forthwith United States armed forces engaged in foreign hostilities, resolution also requires President to consult and report with regard to deployment of armed forces abroad -- these requirements are not affected by Chadha, resolution also requires withdrawal of armed forces after 60 days unless Congress affirmatively authorizes troops to remain by legislation -- Chadha has no impact on constitutional issues raised by this provision) (H.J. Res. 542) (Nov. 7, 1973)

H.R. J. RES. 683, Pub. L. No. 94-110, § 1, 89 Stat. 572, 22 U.S.C. § 2441 note (civilian personnel assigned to monitor Israeli withdrawal from Sinai must be withdrawn if Congress adopts a concurrent resolution) (H.J. Res. 683) (Oct. 13, 1975)

NATIONAL EMERGENCIES ACT, Pub. L. No. 94-412, § 202, 90 Stat. 1255, 50 U.S.C. § 1622 (declaration of national emergency by President authorizes his use of a number of important statutory powers, including power over economic transactions under the International Emergency Economic Powers Act; national emergency may be terminated by concurrent resolution) (H.R. 3884) (Sept. 14, 1976)

INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT ("IEEPA"), Pub. L. No. 95-223, § 207(2)(b), 91 Stat. 1625, 1628, 50 U.S.C. § 1706(b) (Supp. V 1981) (broad power to regulate economic transactions is triggered by declaration of emergency by President based on "unusual and extraordinary threat" from outside the United States, but emergency may be terminated by concurrent resolution procedure contained in National Emergencies Act) (H.R. 7738) (Dec. 28, 1977)

NEUTRALITY ACT OF 1939, 54 Stat. 4, 22 U.S.C. § 441 (Congress, by concurrent resolution, may find that a state of war exists between foreign states requiring President to issue a proclamation naming the states involved; this makes it unlawful under other provisions for American vessels to carry passengers or goods to such countries and for certain materials to be exported from the United States to those countries) (H.J. Res. 306) (Nov. 4, 1939)

ARMS CONTROL AND DISARMAMENT ACT OF 1961, Pub. L. No. 87-297, § 47, 75 Stat. 631, 638, 22 U.S.C. § 2587(b) (transfer of functions to Arms Control and Disarmament Agency subject to 60-day legislative review and one-House veto) (H.R. 9118) (Sept. 26, 1961)

B. International Assistance and Arms Export Control

FOREIGN ASSISTANCE ACT OF 1961, Pub. L. No. 87-195, § 617, 75 Stat. 424, 444, 22 U.S.C. § 2367 (financial assistance made available for the complete range of foreign assistance programs authorized by the Act may be terminated by concurrent resolution, if terminated, an additional 8-month grace period is allowed for shut down) (S. 1983) (Sept. 4, 1961)

EXPORT ADMINISTRATION ACT, amended by DEPARTMENT OF DEFENSE APPROPRIATION AUTHORIZATION ACT, 1975, Pub. L. No. 93-365, § 709(c), 88 Stat. 399, 408, 50 U.S.C. app. § 2403-1(c) (if Secretary of Defense determines that the export of goods or technology will significantly increase the present or potential military capability of any "controlled country," he may oppose such export. The President may overrule the Secretary by reporting his disagreement to Congress; Congress may in turn adopt concurrent resolution overruling the President, thereby giving decisive legal force to Secretary of Defense's decision against export) (H.R. 14592) (Aug. 5, 1974)

INTERNATIONAL DEVELOPMENT AND FOOD ASSISTANCE ACT OF 1975, Pub. L. No. 94-161, §§ 302(2), 310, 89 Stat. 849, 857, 860, 22 U.S.C. §§ 2151a, 2151n (President may provide certain funds to the International Fund for Agricultural Development, subject to approval by the Foreign Relations Committees)

(Foreign Relations Committees may require reports on human rights situation in countries receiving foreign assistance; if Congress disagrees with Administration's justification for continued assistance, it may terminate assistance by concurrent resolution under 22 U.S.C. § 2367) (H.R. 9005) (Dec. 20, 1975)

INTERNATIONAL SECURITY ASSISTANCE AND ARMS CONTROL ACT OF 1976, Pub. L. No. 94-329, §§ 211, 301(a), 302(a) & (b), 90 Stat. 729, 743, 748, 751, 752, 22 U.S.C. §§ 2304(c)(3), 2314(g)(4)(C), 2755(d), 2776(b) (information on human rights policies and exclusionary policies of countries receiving defense and security assistance, sales, or credits must be submitted at the request of either House or the appropriate Foreign Affairs Committee; assistance must be suspended if information is not transmitted within time allowed) (statute generally regulates sales of military equipment to foreign countries through a licensing system requiring periodic cumulative reports to Congress of licenses granted. Provides for 30-day congressional review and disapproval by concurrent resolution of certain sales of defense equipment or services (15 day review for NATO countries, Japan, Australia or New Zealand); exception for presidentially certified national security emergencies) (H.R. 13680) (June 30, 1976); see also International Development Cooperation Act of 1980, Pub. L. No. 96-533, 22 U.S.C. § 2776(c), p. 3.

INTERNATIONAL SECURITY ASSISTANCE ACT OF 1977, Pub. L. No. 95-92, §§ 16, 20, 91 Stat. 614, 622, 22 U.S.C. § 2753(d)(2) (Supp. V 1981) (except in presidentially certified emergency, Congress may disapprove by concurrent resolution certain transfers of defense equipment or services; President must give 30 days notice of proposed transfer (15 days where NATO countries, Japan, Australia or New Zealand is transferee) per § 102(a) of Pub. L. No. 97-113, 95 Stat. 1520, 22 U.S.C. § 2753(d)(2)(B)) (H.R. 6884) (August 5, 1977)

INTERNATIONAL DEVELOPMENT AND SECURITY COOPERATION ACT OF 1980, Pub. L. No. 96-533, § 107(b), 94 Stat. 3131, 3136, 22 U.S.C. § 2776(c)(2) (Supp. V 1981) (authorizes disapproval by concurrent resolution of certain applications for commercial licenses to export defense equipment or services) (H.R. 6942) (Dec. 16, 1980)

INTERNATIONAL SECURITY AND DEVELOPMENT COOPERATION ACT OF 1981, Pub. L. No. 97-113, §§ 109(a), 102(a), 737(b) & (c), 95 Stat. 1525, 1520, 1562, 22 U.S.C. §§ 2796b, 2753(d)(2)(B), 2429(b)(2) & 2429a (Supp. V 1981) (authorizes Congress to disapprove by concurrent resolution certain agreements to lease or loan defense equipment under ch. 2 of Part II of the Foreign Assistance Act of 1961) (authorizes 15-day period for disapproval by concurrent resolution of certain Arms Export Control Act transfers to NATO countries, Japan, Australia or New Zealand) (authorizes congressional disapproval by concurrent resolution, and immediate suspension pursuant to such disapproval, of nuclear enrichment transfers to foreign nations which deliver nuclear reprocessing equipment, materials, or technology to another foreign nation) (S. 1196) (Dec. 29, 1981)

C. Department of Defense

DEFENSE REORGANIZATION ACT OF 1958, Pub. L. No. 85-599, § 3(a), 72 Stat. 514, 10 U.S.C. § 125 (Secretary's authority to transfer, reassign, abolish, and consolidate functions within the Department of Defense is subject to veto by resolution of either House) (H.R. 12541) (Aug. 6, 1958)

DEPARTMENT OF DEFENSE APPROPRIATION AUTHORIZATION ACT, 1974, Pub. L. No. 93-155, § 807, 87 Stat. 605, 615 (1973), 50 U.S.C. § 1431, 50 U.S.C. app. §§ 468, 2092, 10 U.S.C. § 2307 (amends four separate laws to authorize one-House veto of (1) defense procurement contracts in excess of $25,000,000 in which generally applicable statutory contract law has been waived; (2) loans to private business in excess of $25,000,000 to facilitate defense production; (3) advance payments on any defense procurement contract in excess of $25,000,000; and (4) orders for goods which require payments in excess of $25,000,000, placed by an agency under authority of the Military Selective Service Act) (H.R. 9286) (Nov. 16, 1973)

DEPARTMENT OF DEFENSE AUTHORIZATION ACT, 1982, Pub. L. No. 97-86, § 911, 95 Stat. 1099, 1121, 10 U.S.C. § 2382(b) (Supp. V 1981) (authorizes concurrent resolution disapproving presidential regulations controlling excessive profits on defense contracts during emergency periods) (S. 815) (Dec. 1, 1981)

DEPARTMENT OF DEFENSE AUTHORIZATION ACT, 1983, Pub. L. No. 97-252, § 1107, 96 Stat. 718, 744, 10 U.S.C. § 139(e)(3) (prohibition on obligation of funds for major defense acquisition program which exceeds estimated costs may be waived by the Committees on Armed Services of the House and Senate) (S. 2248) (Sept. 8, 1982)

MILITARY CONSTRUCTION CODIFICATION ACT, Pub. L. No. 97-214, §§ 2, 5, 96 Stat. 153, 154-57, 165, to be codified at 10 U.S.C. §§ 2803-07, 2854, 2676 (decision by the Secretary of Defense to undertake certain military construction projects not otherwise authorized by law or costing in excess of amounts otherwise authorized must be transmitted to the appropriate committees of Congress for 21 days; decision may not be implemented until end of 21-day period unless both committees approve the construction before end of period)(Secretary of Defense's decision to carry out repairs, restorations or replacements of military facilities in excess of certain limits must be transmitted to appropriate committees of Congress for 21 days; decisions may not be carried out until end of 21-day period unless committees approve decision before end of period) (Secretary of Defense's award of contract for the acquisition of land must be transmitted to appropriate committees for 21 days, if scope of acquisition is 25% less than that approved by Congress or if cost exceeds certain limits, award may not become effective until end of 21-day period unless both committees approve the award before end of period) (H.R. 6451) (July 12, 1982)

DEFENSE PRODUCTION ACT OF 1950, Pub. L. No 81-774, § 717, formerly § 716, 64 Stat. 822, 50 U.S.C. app. § 2166(b) (Congress may terminate Act or any section of the Act and authority conferred thereunder by concurrent resolution) (H.R. 9176) (Sept. 8, 1950)

DEFENSE PRODUCTION ACT AMENDMENTS, 1970, Pub. L. No. 91-379, § 103, 84 Stat. 796, 50 U.S.C. app. § 2168(h)(3) (cost accounting standards promulgated by the Cost Accounting Standards Board may be disapproved by a concurrent resolution; the Board is an "agent of Congress" and consists of the Comptroller General and four persons appointed by him; U.S. has taken the position in litigation that regulations issued by the Board cannot have legal

force of themselves, but that the Department of Defense "adopted" the regulations, thus avoiding the separation of powers issue, see The Boeing Co. v. U.S., No. 80-1024, Brief for U.S. in Opposition, (March 1983). Board was terminated for lack of funding on Sept. 30, 1980, see U.S. Government Manual 706 (1982-83), but § 103 has not been repealed) (S. 3302) (Aug. 15, 1970).

ENERGY SECURITY ACT, DEFENSE PRODUCTION ACT AMENDMENTS OF 1980, Pub. L. No. 96-294, §§ 104(b)(3), 104(e), 94 Stat. 611, 618, 619-628, 50 U.S.C. app. §§ 2091(e)(1)(B), 2095, 2096 (Supp. V 1981) (provides for prior submission to Congress of "synthetic fuel actions" involving: loans and loan guarantees made by the Departments of Defense, Energy and Commerce for synthetic fuel development; awards of contracts for the purchase or commitment to purchase more than 75,000 barrels per day equivalent of synthetic fuel; and presidential determination to use authority with respect to synthetic fuel in energy shortages of less than 25%; Congress may disapprove actions by resolution of either House, in accordance with procedures established by 50 U.S.C. app. § 2097) (S. 932) (June 30, 1980)

N.B.: Energy Security Act also added the "United States Synthetic Fuels Corporation Act of 1980" to title 42, see p. ____, President's authority under DPA Amendments to enter into new contracts or commitments ceased on the date the Synthetic Fuels Corporation was established and became operational pursuant to that Act, see Exec. Order 12346 (Feb. 8, 1982).

RUBBER PRODUCING FACILITIES DISPOSAL ACT OF 1953, Pub. L. No. 83-205, Act of August 7, 1953, ch. 338, § 9, 67 Stat. 412, 50 U.S.C. app. § 1941g (Commission's proposals and contracts for sale of U.S. owned rubber-producing facilities to be carried out unless either House of Congress disapproves of contracts or proposals within 60 days of their submission to Congress) (H.R. 5728) (Aug. 7, 1953)

DISPOSAL OF SURPLUS VESSELS AND OTHER NAVAL PROPERTY, Pub. L. No. 79-649, § 6, 60 Stat. 897, 898, 10 U.S.C. §§ 7308, 7545 (Congress may disapprove by concurrent resolution Secretary of Navy's proposed transfer of obsolete and condemned vessels and articles of historical interest to states or local governments or to non-profit organizations) (S. 1547) (Aug. 7, 1946)

LONG-RANGE PROVING GROUND FOR GUIDED MISSILES, 1949, Pub. L. No. 81-60, § 2, 63 Stat 66, 50 U.S.C. § 502 (prior to acquisition of land for establishment of long-range proving ground for guided missiles and other weapons, Secretary of Defense must "come into agreement" with Armed Services Committee of House and Senate) (H.R. 1741) (May 11, 1949)

D. Armed Forces Personnel

DEPARTMENT OF DEFENSE AUTHORIZATION ACT, 1981, Pub. L. No. 96-342, § 302(b)(1), 94 Stat. 1077, 1087, 10 U.S.C. § 520 (Secretary of Defense's waiver of statutory limitation on enlistment and induction of persons scoring below a prescribed level on Armed Forces Qualifications Test is subject to disapproval by concurrent resolution) (H.R. 6974) (Sept. 8, 1980)

UNIVERSAL MILITARY TRAINING AND SERVICE AMENDMENTS OF 1951, Pub. L. No. 82-51, § 1(j), 65 Stat. 75, 80, 50 U.S.C. app. § 454(k) (President authorized to decrease or eliminate periods of service for persons in armed forces; Congress retains parallel authority to decrease or eliminate such service by concurrent resolution, in effect reserving to itself power to review and countermand by concurrent resolution a presidential decision not to decrease or eliminate the period of service) (S. 1) (June 19, 1951)

VETERANS HEALTH PROGRAM EXTENSION AND IMPROVEMENT ACT OF 1979, Pub. L. No. 96-151, § 307, 93 Stat. 1097, 38 U.S.C. § 219 note (Supp. V 1981) (Administrator of VA directed to conduct study of any long-term adverse health effects resulting from exposure to dioxins ("Agent Orange Study"), pursuant to protocol approved by Director of Office of Technology Amendment, an officer of the Legislative Branch; Director of OTA also assigned responsibility for monitoring the VA's compliance with the protocol; VA's authority to proceed with study thus is subject to veto by legislative officer) (S. 1039) (Dec. 20, 1979)

II.

IMMIGRATION AND NATIONALITY

IMMIGRATION AND NATIONALITY ACT OF 1952, Pub. L. No. 82-414, § 245(b)-(d), 66 Stat. 163, 216-17, 8 U.S.C. § 1254(c)-(d) (suspension of deportation granted by the Attorney General may be overridden by either one-house veto or concurrent resolution depending upon grounds of alien's deportation. The one-House veto provision was struck down in Chadha) (H.R. 5678)(June 27, 1952)

IMMIGRATION AND NATIONALITY ACT AMENDMENTS, Pub. L. No. 85-316, § 13(c), 71 Stat. 639, 642-43, 8 U.S.C. § 1255b(c) (Attorney General's determinations of adjustment of status of aliens must be submitted to Congress and may be vetoed by either House) (S. 2792)(Sept. 11, 1957)

III.

BUDGET

CONGRESSIONAL BUDGET AND IMPOUNDMENT CONTROL ACT OF 1974, Pub. L. No. 93-344, § 1013, 88 Stat. 297, 334-35, 2 U.S.C. § 684 (in order to defer (spend at a rate slower than that required by statute) appropriated funds, President must transmit deferral message to Congress, which may disapprove it by resolution of either House) (H.R. 7130) (July 12, 1974)

IV.

INTERNATIONAL TRADE

TRADE EXPANSION ACT OF 1962, Pub. L. No. 87-794, § 351, 76 Stat. 872, 899, 19 U.S.C. § 1981(a) (unless President imposes a tariff or duty based on Tariff Commission action transmitted to him, the tariff or duty recommended by Tariff Commission may be imposed, with or without the President's agreement, by concurrent resolution of approval) (H.R. 11970) (Oct. 11, 1962)

TRADE ACT OF 1974, Pub. L. No. 93-618, §§ 203(c), 302(b), 331, 402(d), 404, 405(c), 407, 88 Stat. 1978, 2016, 2043, 2051-52, 2057-60, 2063-64, 19 U.S C §§ 1303(e) 2253(c), 2412(b), 2432, 2434, 2435, 2437 (proposed presidential actions on import relief and actions concerning certain countries may be disapproved by concurrent resolution; various presidential proposals for waiver extensions and for extension of nondiscriminatory treatment to products of foreign countries may be disapproved by simple (either House) or concurrent resolutions) (H.R. 10710)(Jan. 3, 1975)

EXPORT-IMPORT BANK AMENDMENTS OF 1974, Pub. L. No. 93-646, § 8, 88 Stat. 2333, 2336, 12 U.S.C. § 635e (presidentially proposed limitation for exports to USSR in excess of $300,000,000 must be approved by concurrent resolution) (H.R. 15977)(Jan. 4, 1974)

EXPORT ADMINISTRATION ACT OF 1979 ("EAA"), Pub. L. No. 96-72, §§ 7(d)(2), 7(g)(3), 93 Stat. 503, 518, 520, 50 U.S.C. app. §§ 2406(d)(2)(B), 2406(g)(3) (Supp. V 1981) (President may propose, under § 7(d)(2), export of Alaskan North Slope crude oil, which must be approved by concurrent resolution) (under § 7(g)(3), action by Secretary of Commerce to prohibit or curtail export of agricultural commodities may be disapproved by concurrent resolution) (S. 737) (Sept. 29, 1979)

V.

ENERGY

TRANS-ALASKA PIPELINE AUTHORIZATION ACT, Pub. L. No. 93-153, § 101, 87 Stat. 576, 582, 30 U.S.C. § 185(u) (except for exchanges and temporary transportation, domestically produced crude oil transported over federal rights of way may be exported only upon presidential findings; Congress may disapprove findings by concurrent resolution) (S. 1081) (Nov. 16, 1973)

FEDERAL NONNUCLEAR ENERGY RESEARCH AND DEVELOPMENT ACT OF 1974, Pub. L. No. 93-577, § 12, 88 Stat. 1878, 1892-1893, 42 U.S.C. § 5911 (rules or orders proposed by the President concerning allocation or acquisition of essential materials may be disapproved by resolution of either House) (S. 1283) (Dec. 31, 1974)

ENERGY POLICY AND CONSERVATION ACT, Pub. L. No. 94-163, §§ 159(a) & (e), 201(d)(2), 201(b) & (d)(1), 89 Stat. 871, 886, 891 (1975), 42 U.S.C. §§ 6239(a) & (e), 6261(d)(2), 6261(b) & (d)(1) (certain presidentially proposed "energy actions" involving Strategic Petroleum Reserve and amendments to energy conservation contingency plans may be disapproved by resolution of either House pursuant to procedures established by § 551, 42 U.S.C. § 6421) (energy conservation contingency plans must be transmitted to both Houses for approval pursuant to procedures established by § 552, 42 U.S.C. § 6422) (S. 622) (Dec. 22, 1975); amended by Energy Security Act, Pub. L. No. 96-294, § 803, 94 Stat. 776, 42 U.S.C. § 6240(e)(1) & (2) (President's request to suspend provisions requiring build-up of SPR and limiting sale or disposal of SPR in emergency situations must be submitted to Congress and approved pursuant to § 552, 42 U.S.C. § 6422) (S. 932) (June 30, 1980)

NAVAL PETROLEUM RESERVES PRODUCTION ACT OF 1976, Pub. L. No. 94-258, § 201, 90 Stat. 303, 309, 10 U.S.C. § 7422(c)(2)(C) (President's extension of production period for naval petroleum reserves may be disapproved by resolution of either House) (H.R. 49) (April 5, 1976)

DEPARTMENT OF ENERGY ACT OF 1978 -- CIVILIAN APPLICATIONS, Pub. L. No. 95-238, §§ 107, 207(b), 92 Stat. 47, 55, 70, 22 U.S.C. § 3224a, 42 U.S.C. § 5919(m) (Supp. V 1981) (international agreements and expenditures by Secretary of Energy of appropriations for foreign spent nuclear fuel storage must be approved by concurrent resolution, if not consented to by legislation) (plans for use of appropriated funds may be disapproved by the appropriate committee of either House) (financing in excess of $50,000,000 for demonstration facilities must be approved by resolution in both Houses, if not consented to by legislation) (S. 1340) (Feb. 1978)

OUTER CONTINENTAL SHELF LANDS ACT AMENDMENTS OF 1978, Pub. L. No. 95-372, §§ 205(a), 208, 92 Stat. 629, 641, 668, 43 U.S.C. §§ 1337(a)(4), 1354(c) (Supp. V 1981) (establishment by Secretary of Energy of oil and gas lease bidding system may be disapproved by resolution of either House) (export of oil and gas from the Outer Continental Shelf may be disapproved by concurrent resolution) (S. 9) (Sept. 18, 1978)

NATURAL GAS POLICY ACT OF 1978, Pub. L No 95-621, §§ 122(c), 202(c) & 206(d)(2), 507, 92 Stat. 3350, 3370, 3371, 3372, 3380, 3406, 15 U.S.C. §§ 3332, 3342(c), 3346(d)(2) 3417 (Supp. V 1981) (presidential reimposition of natural gas price controls may be disapproved by concurrent resolution) (Congress may reimpose natural gas price controls by concurrent resolution) (Federal Energy Regulatory Commission amendment to pass through incremental costs of natural gas, and exemptions therefrom, may be disapproved by resolution of either House) (procedure for congressional review established) (H.R. 5289) (Nov. 9, 1978)

ENERGY SECURITY ACT, UNITED STATES SYNTHETIC FUELS CORPORATION ACT OF 1980, Pub. L. No. 96-294, §§ 126(d)(2), 126(d)(3), 132(a)(3)(B), 133(a)(3)(B), 137(b), 137(c), 141(d), 179(a), 94 Stat. 649, 659, 660, 663, 666, 679, 42 U.S C. § 8722(d)(2), 8722(d)(3), 8732(a)(3)(B), 8733(a)(3)(B), 8737(b), 8737(c), 8741(d), 8779 (Supp V 1981) (request by Synthetic Fuels Corporation (SFC) for additional time to submit comprehensive strategy may be disapproved by resolution of either House, pursuant to § 128, 42 U.S.C. § 8724) (amendments to the comprehensive strategy proposed by the SFC Board of Directors must be approved by concurrent resolution pursuant to § 129, 42 U.S.C. § 8725) (loans for costs of synthetic fuel projects in excess of 250% of initial estimated cost may be disapproved by resolution of either House, pursuant to § 128, 42 U S.C. § 8724) (loan guarantees for costs of synthetic fuel projects in excess of 250% of initial estimated costs may be disapproved by resolution of either House pursuant to § 128, 42 U S.C § 8724) (acquisition by the SFC of control of a synthetic fuel project that was receiving financial assistance may be disapproved by either House pursuant to § 128, 42 U.S.C. § 8724) (lease-back of synthetic fuel projects acquired by the SFC may be disapproved by either House pursuant to § 128, 42 U.S.C. § 8724) (SFC contract renegotiations exceeding initial cost estimates by 175% may be disapproved by either House pursuant to § 128, 42 U.S.C. § 8724) (proposed financial assistance to synthetic fuel projects in the Western Hemisphere outside the U.S. may be disapproved by resolution of either House pursuant to § 128, 42 U.S.C. § 8724) (S. 932) (June 30, 1980)

N.B.: Energy Security Act also amended Defense Production Act of 1950, p. 6.

ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION AUTHORIZATION ACT, Pub. L. No. 94-187, § 201, 89 Stat. 1063, 1069 (ERDA [now DOE] may enter into cooperative arrangements for research, development, design, construction and operation of Liquid Metal Fast Breeder Reactor powerplant if details are submitted to the appropriate committees 45 days prior to effective date of arrangement, committees may waive conditions of all or part of the 45-day period) (H.R. 3474) (Dec. 31, 1975)

DEPARTMENT OF ENERGY NATIONAL SECURITY AND MILITARY APPLICATIONS OF NUCLEAR ENERGY AUTHORIZATION ACT OF 1980, Pub. L. No. 96-164, §§ 201, 203, 93 Stat. 1259, 1262, 1262-63 (committees may waive all or portion of 30-day report-and-wait period for submission of programs that will use funds appropriated pursuant to the Act) (committees may waive all or portion of 30-day report-and-wait period for construction projects in excess of specified limits) (S. 673) (Dec. 29, 1979)

DEPARTMENT OF ENERGY NATIONAL SECURITY AND MILITARY APPLICATIONS OF NUCLEAR ENERGY AUTHORIZATION ACT OF 1981, Pub. L. No. 96-540, §§ 201, 203, 94 Stat. 3197, 3200-01, 3201 (committees may waive all or portion of 30-day report-and-wait period for submission of programs that will use funds appropriated pursuant to the Act) (committees may waive all or portion of 30-day report-and-wait period for construction projects in excess of specified limits) (S. 3074) (Dec. 17, 1980)

DEPARTMENT OF ENERGY NATIONAL SECURITY AND MILITARY APPLICATIONS OF NUCLEAR ENERGY AUTHORIZATION ACT OF 1982, Pub. L. No. 97-90, §§ 201, 203, 212, 95 Stat. 1163, 1167, 1167-68, 1171 (committees may waive all or portion of 30-day report-and-wait period for submission of programs that will use funds appropriated pursuant to the Act) (committees may waive all or portion of 30-day report-and-wait period for construction projects in excess of specified limits) (committees may waive all or portion of 30-day report-and-wait period for proposed environmental impact statements that will cost in excess of $250,000) (H.R. 3413) (Dec. 14, 1981)

VI.

ATOMIC ENERGY AND NUCLEAR MATERIALS

ATOMIC ENERGY ACT OF 1954, Pub. L. No. 83-703, §§ 51, 61, 123(c), 164, 68 Stat. 919, 929, 932, 940, 951, 42 U.S.C. §§ 2071, 2091, 2153(c) & (d), amended by Pub. L. No. 85-479, § 4, 72 Stat. 276, 277-78 (1958), Pub. L. No. 85-681, § 4, 72 Stat. 632 (1958) and Pub. L. No. 93-485, 88 Stat. 1460 (1974), 2204 (NRC's determination that something is "special nuclear material" must be reported to the appropriate committees for a 30-day period, which the committees can waive) (any determination by the NRC that certain material is "source material" must, after it has been approved by the President, be reported to the appropriate committees for 30-day review, which they may waive) (the undertaking of certain international cooperation agreements is prohibited until they are submitted for committee approval for either 30- or 60-day waiting periods, depending upon which section of the Act they arise under, the 30 day waiting period may be waived by the committees; during the 60 day waiting period Congress may disapprove the agreement by concurrent resolution) (NRC required to submit contracts entered into for electric utility services to the appropriate committees for a 45-day report-and-wait period, which the committees may waive) (H.R. 9757) (Aug 30, 1974)

ATOMIC ENERGY ACT AMENDMENTS OF 1957, Pub. L. No. 85-79, § 2, 71 Stat. 274, 275, amended by Pub. L. No. 88-489, § 13, 78 Stat. 602, 605 (1964), 42 U.S.C. § 2078 (NRC must submit to the appropriate committees proposals for guaranteed purchase prices and purchase periods for plutonium, and criteria for waiver of charges for certain licenses for a 45-day report-and-wait period which the committee may waive) (S. 2243) (July 3, 1957)

ATOMIC ENERGY AMENDMENTS OF 1964, Pub. L. No. 88-489, § 16, 78 Stat. 602, 606, 42 U.S.C. § 2201 (NRC's proposed criteria for setting terms of contracts for production or enrichment of special nuclear material must be submitted to the appropriate committees for 45-day period, which the committees may waive) (S. 3075) (Aug. 26, 1964)

ATOMIC ENERGY ACT AMENDMENTS OF 1974, Pub. L. No. 93-377, § 2, 88 Stat. 472, 474, 42 U.S.C. § 2074(a) (foreign distribution of special nuclear material is subject to a 60-day waiting period during which Congress may disapprove by a concurrent resolution) (S. 3669) (Aug. 17, 1974)

NUCLEAR NON-PROLIFERATION ACT OF 1978, Pub. L. No. 95-242, §§ 104(f), 303(a), 304(a), 304(b), 306, 307, 308, 401, 92 Stat. 120, 123, 130-31, 134-35, 137-39, 144, 22 U.S.C. § 3223(f), 42 U.S.C. §§ 2153(c) & (d), 2155(b), 2157(b), 2158, 2160(f) (Supp. V 1981) (Executive agreements with foreign governments related to export of nuclear material and technology; agreements concerning storage and disposition of spent nuclear fuel or proposed export of nuclear facilities, materials, or technology; and proposed agreements for international cooperation in nuclear reactor development must be submitted to Congress. Committees may waive waiting period for certain agreements; other agreements are subject to disapproval by concurrent resolution) (President's decision to grant license for export of nuclear materials or facilities despite negative finding by NRC may be overridden by Congress by concurrent resolution during 60-day review period)(President's determination to export nuclear materials or facilities to countries that fail to abide by safeguards may be overridden by Congress by concurrent resolution during 60-day review period) (President's decision to continue export of nuclear equipment and materials to countries that violate certain safeguards, laws, or agreements may be overridden by Congress by concurrent resolution during 60-day review period) (commitments by U.S. to store foreign spent nuclear material in the U.S. may be overridden by Congress by concurrent resolution during 60-day review period, provision does not apply if President determines there is an emergency situation and that storage is in the national interest) (H.R. 8638) (Mar. 10, 1978).

NUCLEAR REGULATORY COMMISSION AUTHORIZATION, Pub. L. No. 97-415, § 1(c), 96 Stat. 2067, 2068 (reallocation of appropriations may not be made until after 30-day report-and-wait period, which committees may waive) (H.R. 2330) (Jan. 4, 1983)

NUCLEAR WASTE POLICY ACT OF 1982, Pub. L. No. 97-425, § 302, 96 Stat. 2202, 2257, to be codified at 42 U.S.C. § 10222(a)(4) (Secretary of Energy's decision to adjust fee imposed on generators of nuclear power in order to recover full cost of disposing of their wastes may be disapproved by either House) (H.R. 3809) (Jan. 7, 1983)

VII.

FEDERAL PAY AND EMPLOYMENT

FEDERAL PAY COMPARABILITY ACT OF 1970, Pub. L. No. 91-656, § 3, 84 Stat. 1946, 1949, 5 U.S.C. § 5305 (provides for annual review and adjustment of GS schedule pay by President after considering report of agent and recommendations of Advisory Committee on Federal Pay; if President, because of national emergency or economic conditions affecting general welfare, considers it inappropriate to make pay adjustment based on report of his agent and recommendations of the Advisory Committee, he shall transmit alternative plan to Congress by September 1 of that year; if either House of Congress adopts a resolution disapproving the President's alternative plan within 30 days of continuous session after date on which plan is transmitted, the President shall adjust the rates of pay based on the report of his agent and the Advisory Committee and in accordance with the statutory principles of comparability) (H.R. 13000) (Jan. 8, 1971)

• POSTAL REVENUE AND FEDERAL SALARY ACT OF 1967, Pub. L. No. 90-206, § 225(i), 81 Stat. 613, 644, 2 U.S.C. § 359, amended by Pub. L. No. 95-19, Title IV, § 401(a), 91 Stat. 45, 2 U.S.C. § 359 (1977 amendment to legislation governing quadrennial review of executive, judicial, and legislative salaries provides that President's recommendations for pay rates will become effective 30 days after a majority of both Houses approves the recommendations; Congress must act within sixty days of the submission of the President's recommendations, earlier law provided that recommendations would become effective after 30 days unless a statute had been enacted during that 30-day period establishing other rates of pay or either House disapproved the recommendations; this provision was altered pending a challenge to its constitutionality in McCorkle v. U.S., 559 F.2d 1258 (4th Cir. 1977), which held the provision severable so as to avoid reaching the constitutional question) (orig. bill H.R. 7977; 1977 amend. H.R. 4800) (Dec. 16, 1967; Apr. 12, 1977)

CIVIL SERVICE REFORM ACT OF 1978, Pub. L. No. 95-454, § 515, 92 Stat. 1111, 1179, 5 U.S.C. § 3131 note (Supp. V 1981) (continuation of Senior Executive Service may be disapproved by concurrent resolution) (S. 2640) (Oct. 13, 1978)

CENTRAL INTELLIGENCE AGENCY RETIREMENT ACT OF 1964 FOR CERTAIN EMPLOYEES, Pub. L. No. 88-643, § 201(a), 78 Stat. 1043, 50 U.S.C. § 403 note (rules and regulations governing CIA retirement system become effective "after approval by the Chairman and ranking minority members of the Armed Services Committees of the House and Senate") (H.R. 8427) (Oct. 13, 1964)

INTERNATIONAL DEVELOPMENT AND FOOD ASSISTANCE ACT OF 1978, Pub. L. No. 95-424, § 401(b), 92 Stat. 937, 956, 22 U.S.C. § 2385a(b)(2) (Supp. V 1981) (President must submit regulations establishing uniform personnel system for foreign service employees to Congress for 90-day review; regulations subject to one-House veto during that time) (H.R. 12222) (October 6, 1978) (date was amended and fixed at May 1, 1979 by 93 Stat. 378)

VIII.

LAND AND NATURAL RESOURCES

WATER RESOURCES DEVELOPMENT ACT OF 1974, Pub. L. No. 93-251, § 12, 88 Stat. 16, 17, 33 U.S.C. § 579 (Secretary of Army, acting through Corps of Engineers, directed to submit annually to Congress a list of water resource development projects which have been authorized for at least eight years without any funds having been appropriated for them, and which he has determined should no longer be authorized; any project on list is "deauthorized" at the end of a 90-day period unless either House adopts a resolution stating that the project should continue to be authorized. In effect the law gives the Secretary a constitutionally questionable power to "deauthorize" projects, and makes it subject to an unconstitutional one-House veto) (H.R. 10203) (March 7, 1974)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976 ("FLPMA"), Pub. L. No. 94-579, §§ 203(c), 204(c)(1) & (1)(2), 90 Stat. 2743, 2750, 2751, 2752, 43 U.S.C. §§ 1713(c), 1714(c)(1) & (1)(2) (sale of public lands in excess of two thousand five hundred acres, withdrawal of public lands aggregating five thousand acres or more, or termination of withdrawal of certain public lands may be disapproved by concurrent resolution) (S. 507) (Oct. 21, 1976)

MARINE PROTECTION, RESEARCH, AND SANCTUARIES ACT AMENDMENTS, 1980, Pub. L. No. 96-332, § 2, 94 Stat. 1057, 16 U.S.C. § 1432 (b)(2) (Supp. V 1981) (designation by the Secretary of Commerce of an area as a marine sanctuary may be disallowed by a concurrent resolution of both Houses of Congress) (S. 1140) (Aug. 29, 1980)

NATIONAL PARKS AND RECREATIONAL ACT OF 1978, Pub. L. No. 95-625, § 1301, 92 Stat. 3467, 3549 (Supp. V 1981) (Secretary of Agriculture shall not process any exchange of more than 6,400 acres of land owned by the Burlington Northern Railroad in Montana for land owned by the United States elsewhere in Montana unless authorized by concurrent resolution of Congress) (S. 791) (Nov. 10, 1978)

FOREST AND RANGELAND RENEWABLE RESOURCES PLANNING ACT OF 1974, Pub. L. No. 93-378, § 7(a), 88 Stat. 476, 478, 16 U.S.C. § 1606 (Secretary of Agriculture shall prepare and update a Renewable Resource Assessment and a Renewable Resource Program to be transmitted, together with a Statement of Policy to be used in framing budget requests, by the President to the Congress. The President, "subject to other actions of the Congress," shall carry out programs already established by law in accordance with the Statement of Policy, as amended or modified by Congress, unless the Statement is disapproved by resolution of either House) (S. 2296) (Aug. 17, 1974)

ACT TO EXPEDITE THE REHABILITATION OF FEDERAL RECLAMATION PROJECTS, Pub. L. No. 81-451, 64 Stat. 11, 43 U.S.C. § 504 (This is a report and wait requirement with a two-committee waiver provision. Expenditures of funds for federal reclamation projects can be made only after the organizations concerned have obligated themselves in installments fixed in accordance with their ability to pay, as determined by the Secretary of the Interior in light of their outstanding repayment obligations. No such determination of the Secretary shall become effective until the expiration of 60 days after it is submitted to specified House and Senate Committees. However, with the approval in writing of each committee, it may become effective in less than 60 days) (H.R. 7220)

ACT TO FACILITATE THE CONSTRUCTION OF DRAINAGE WORKS, ETC., Pub. L. No. 84-575, 70 Stat. 274, 43 U.S.C. § 505 (This is a report and wait requirement with a two-committee waiver provision. The Secretary of Interior must report to both Houses of Congress 60 days before contracting with one "repayment organization" for more than $200,000 for construction of "drainage facilities and other minor items." The Secretary of Interior may execute such a contract in less than 60 days with the approval of both the Senate and House Committees in writing) (H.R. 6268)

AMENDMENT TO WATERSHED PROTECTION AND FLOOD PREVENTION ACT, Pub. L. No. 87-639, § 1, 76 Stat. 438, 16 U.S.C. § 1009 (Senate or House Committee on Public Works may adopt resolution authorizing and directing Secretary of the Army and Secretary of Agriculture to make joint investigations and surveys of watershed areas in accordance with their existing authorities; reports recommending installation of works of improvement for flood prevention or conservation of water are then submitted to Congress through the President for authorization as provided for in that chapter) (H.R. 380) (Sept. 5, 1962)

IMPERIAL DAM PROJECT MODIFICATIONS -- COLORADO RIVER BASIN SALINITY CONTROL ACT, Pub. L. No. 93-320, § 208, 88 Stat. 266, 274, 43 U.S.C. § 1598(a) (authorizes the Secretary of the Interior to provide for modifications of the Imperial Dam projects authorized by the Act "as determined to be appropriate

for purposes of meeting the objective of [the Act]." However, no funds for any such modifications may be expended until the expiration of a 60-day period after the proposed modification has been submitted to "appropriate committees of Congress," and not then if disapproved by such committees. However, funds may be expended prior to the expiration of the 60-day period if Congress by concurrent resolution so approves) (H.R. 12165) (June 24, 1974)

CONVEYANCE OF SUBMERGED LANDS TO GUAM, VIRGIN ISLANDS, AND AMERICAN SAMOA, Pub. L. No. 93-435, § 1(c), 88 Stat. 1210, 1211, 48 U.S.C. § 1705(c) (conditions the Secretary of Interior's authority to convey certain submerged lands on his being informed by House and Senate Committees on Interior and Insular Affairs, during a 60-day waiting period, that they "wish to take no action with respect to the proposed conveyance") (H.R. 11559) (Oct. 5, 1974)

OLYMPIC NATIONAL PARK -- AUTHORITY TO ACCEPT LAND, Pub. L. No. 94-578, § 320, 90 Stat. 2732, 2739-40, 16 U.S.C § 251g (authorizes the Secretary of the Interior to acquire privately-owned lands to be included within the boundaries of Olympic National Park, with certain exceptions, after having transmitted the results of a study of the lands to the President and the Congress within two years of October 21, 1976. The plans shall take effect unless disapproved by majority vote of either House within 90 legislative days of their submission to Congress) (H.R. 13713) (Oct. 21, 1976)

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT, Title IX, Implementation of Alaska Native Claims Settlement Act and Alaska Statehood Act, Pub. L. No. 96-487, § 906(j)(5), 94 Stat. 2371, 2441, 43 U.S.C. § 1635(j)(5) (Supp. V 1981) (providing that certain withdrawals or designations of lands outside the boundaries of, e.g., a conservation system unit or national forest, shall not, without more, remove these lands from the status of vacant, unreserved, and unappropriated public lands that the State of Alaska is entitled to select for conveyance to the State; however, withdrawals exceeding 5,000 acres that Congress approves by concurrent resolution within no later than 180 days of the withdrawal or Dec. 2, 1980, are excepted from this status) (H.R. 39) (Dec. 2, 1980)

N.B.: This section intersects with Congress' power under FLPMA (p. 17) to disapprove by concurrent resolution withdrawals aggregating 5,000 acres or more.

IX.

INDIAN AFFAIRS

INDIAN CLAIMS JUDGMENT FUNDS ACT, 1973, Pub. L. No. 93-134, §§ 2(b), 5, 87 Stat. 466, 468, amended by Pub. L. No. 97-164, § 160(a)(1), 96 Stat. 48, and Pub. L. No. 97-458, 96 Stat. 2512 25 U.S.C. §§ 1402(e), 1405 (Congress may extend period in which Secretary of the Interior must propose and submit to Congress a plan for the use and distribution of Indian judgment funds, by action of appropriate committees)(introduction in either House of a joint resolution disapproving plan by Secretary of the Interior for distribution of judgment funds awarded to Indian tribes or groups recommences 60-day period during which Congress may decide whether to adopt plan) (S. 1016) (Jan. 12, 1983)

MENOMINEE RESTORATION ACT, Pub. L. No. 93-197, § 6, 87 Stat 770, 773, 25 U.S.C. § 903d(b) (plan by Secretary of the Interior for assumption of the assets of the Menominee Indian corporation may be disapproved by resolution of either House) (H.R. 10717) (Dec. 22, 1973)

RESTORATION OF INDIAN TRIBES OF UNCLAIMED PAYMENTS, 1961, Pub. L. No. 87-283, § 2, 75 Stat. 584, 25 U.S.C. § 165 (Secretary of the Interior may not restore to tribal ownership or deposit in the Treasury certain unclaimed individual payments until 60 days after he notifies the House and Senate Committees on Interior and Insular Affairs of the proposed action and each Committee notifies him that it has no objection) (S. 1768) (Sept. 22, 1961)

GOVERNMENT-OWNED UTILITIES USED FOR BUREAU OF INDIAN AFFAIRS, 1961, Pub. L. No. 87-279, 75 Stat. 577, 25 U.S.C. § 15 (no contract by the Secretary of the Interior relating to the sale, operation, maintenance, repair, or relocation of government-owned utilities used in the administration of the BIA shall be executed until 60 days after the contract and a statement of reasons for proposing the contract is submitted to the House and Senate Committees on Interior and Insular Affairs, and neither House has an objection) (S. 1501) (Sept. 22, 1961)

ACT OF JULY 1, 1932, Pub. L. No. 72-240, 47 Stat. 564, amended by Pub. L. No. 97-375, § 208(a), 96 Stat. 1824, 25 U.S.C. § 386a (Secretary of the Interior is authorized to adjust or eliminate reimbursable charges of Government against individual Indians or Indian tribes and shall report adjustments or eliminations to Congress not later than 60 calendar days after end of fiscal year in which they are made; proceedings shall not be effective until approved by Congress unless Congress fails to act within 90 days thereon, favorably or unfavorably, by concurrent resolution) (H.R. 10884) (July 1, 1932)

EDUCATION AMENDMENTS OF 1978, Pub. L. No. 95-561, § 1138, 92 Stat. 2143, 2327, 25 U.S.C. § 2018 (Supp. V 1981) (regulations required under §§ 1126-1137 of Pub. L. No. 95-561, relating to BIA education functions, are deemed regulations of general applicability, which must be submitted for congressional review under 20 U.S.C. § 1232) (H.R. 15) (Nov. 1, 1978) (see also p. 25)

X.

TRANSPORTATION

REGIONAL RAIL REORGANIZATION ACT OF 1973, Pub. L. No. 93-236, 87 Stat. 985, § 208, 45 U.S.C. § 718 (Supp. V 1981) (final system plan adopted by the United States Railway Association and revisions may be disapproved within 60 days by a resolution of either House)(H.R. 9142)(Jan. 2, 1974)

N.B.: The time periods within which plans must be submitted suggest that plans can no longer be submitted under this provision, 45 U.S.C. § 717. Nevertheless technical changes were made in the congressional veto provision as recently as 1980. 45 U.S.C. § 718(a) (Supp. V 1981)

UNION STATION REDEVELOPMENT ACT OF 1981, Pub. L. No. 97-125, § 3; 95 Stat. 1667, 1670, 8 U.S.C. § 814(e) (Supp. V 1981) (no funds from the Northeast Corridor Improvement Project and other rail projects in excess of $29 million shall be available for rehabilitation of Union Station if, within 90 days of continuous session after request for such excess funds, either the House Committee on Energy and Commerce or the Senate Committee on Commerce, Science, and Transportation disapproves the request) (S. 1192) (Dec. 29, 1981)

FEDERAL-AID HIGHWAY ACT OF 1976, Pub. L. No. 94-280, § 107(b)(2), 90 Stat. 425, 430-31, amending 23 U.S.C. § 104 (b)(5)(A) (requires Secretary of Transportation to transmit revised estimates of the cost of completing the then-designated Interstate [Highway] System ("Interstate Cost Estimates") on specified dates and transmit the same to the Senate and the House within ten days. Upon approval by Congress, the Secretary shall use the Federal share of the approved estimates for making apportionments for subsequent fiscal years. For estimates submitted in 1961 and before, § 104(h)(5)(A) provides "upon approval by the Congress by concurrent resolution;" for estimates submitted in 1965 and after, § 104(b)(5)(A) provides only "upon approval by the Congress") (H.R. 8235)

N.B.: Although the language does not compel the interpretation, this provision has been treated by DOT and Congress as permitting approval by concurrent resolution. Approvals have sometimes been done by concurrent resolution, and sometimes, if a highway bill is pending, by adding a provision to it. See, e.g., S. Con. Res. 62, Dec. 15, 1975, approving an interstate cost estimate for fiscal year 1977, and H. Con. Res. 282, July 21, 1977, which affirmatively revised the estimate for fiscal year 1979

ENERGY POLICY AND CONSERVATION ACT, Pub. L. No. 94-163, § 301, 89 Stat. 871, 902, amending § 502 of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. § 2002(a)(4) & (5) (Secretary of Transportation may, by rule, amend the average fuel economy standard specified in § 2002(a)(1) for model year 1985 and subsequent model years; any such amendment which increases an average fuel economy standard to above 27.5 miles per gallon or below 26.0 miles per gallon shall not take effect if either House disapproves it) (S. 622) (Dec. 22, 1975)

REVISIONS OF TITLE 49, U.S.C.A., Pub. L. No. 97-449, § 334, 96 Stat. 2413, 2430, 49 U.S.C. § 334, which codifies § 145 of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 45, 92 Stat. 1705, 1753, formerly 49 U.S.C. § 1341 note (S. 2493) (Secretary of Transportation may impose a charge for an approval, test, authorization, certificate, permit, registration, transfer or rating related to aviation that has not been approved by Congress only if the charge was in effect on Jan. 1, 1973 and it is not more than that charge) (H.R. 6993)

N.B.: Although the language does not require the interpretation, this provision has been treated in practice by DOT and Congress as permitting approval by concurrent resolution.

XI.

DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA SELF-GOVERNMENT AND GOVERNMENTAL REORGANIZATION ACT, Pub. L. No. 93-198, §§ 303, 602(c)(1) and (2), 87 Stat. 774, 784, 814 (District of Columbia Charter amendments ratified by electors must be approved by concurrent resolution) (acts of District of Columbia Council may be disapproved by concurrent resolution) (acts of District of Columbia Council under certain titles of D.C. Code may be disapproved by resolution of either House) (S. 1435) (Dec. 24, 1973)

DISTRICT OF COLUMBIA RETIREMENT REFORM ACT, Pub. L. No. 96-122, § 164, 93 Stat. 866, 891-92 (required reports to Congress on the District of Columbia retirement program may be rejected by resolution of either House) (S. 1037) (Nov. 17, 1979)

PENNSYLVANIA AVENUE DEVELOPMENT CORPORATION ACT OF 1972, Pub. L. No. 92-578, § 4(d), 86 Stat. 1266, 1269-70, 40 U.S.C. § 874(d) (Pennsylvania Avenue Development Corporation may not proceed with development plan if, within 60 days of transmittal to Congress, either House passes a resolution of disapproval) (H.R. 10751) (Oct. 27, 1972)

DWIGHT D. EISENHOWER MEMORIAL BICENTENNIAL CIVIC CENTER ACT, Pub. L. No. 92-520, § 3, 86 Stat. 1019, 1021, 40 U.S.C. § 616(d)(4) (District of Columbia may not enter into any purchase contract for construction of civic center until 30 days after approval by four committees of center's design and estimated cost) (S. 3943) (Oct. 21, 1972)

XII.

AGRICULTURE

FUTURES TRADING ACT OF 1978, Pub. L. No. 95-405, 92 Stat. 865, § 26, 7 U.S.C. § 16a (Supp. V 1981) (plan of fees developed by the Commodity Futures Trading Commission to cover the estimated cost of regulating transactions cannot be implemented until approved by the House and Senate Agriculture Committees) (S. 2391) (Sept. 30, 1978)

AGRICULTURE AND FOOD ACT OF 1981, Pub. L. No. 97-98, Title XV, § 1522, 95 Stat. 1213, 1336, 16 U.S.C. § 3443 (Supp. V 1981) (Secretary of Agriculture required to submit plans for testing feasibility of reducing excessive sedimentation in no more than five publicly owned reservoirs to the Senate Committee on Agriculture, Nutrition, and Forestry and the House Committee on Agriculture for approval prior to implementation) (S. 884) (Dec. 22, 1981)

TAFT ANTI-INFLATION LAW, Pub. L. No. 80-395, § 7, 61 Stat. 947, 50 U.S.C. app. § 1917 (Commodity Credit Corp. may carry out projects to stimulate production of food in non-European countries but program must be submitted to Congress and is subject to disapproval by concurrent resolution within 60 days) (S.J. Res. 167) (Dec. 30, 1947)

XIII.

RULEMAKING

DEPARTMENT OF EDUCATION ORGANIZATION ACT, Pub. L. No. 96-88, § 414(b), 93 Stat. 668, 685, 20 U.S.C. § 3474 (Supp. V 1981) (rules and regulations promulgated with respect to the various functions, programs and responsibilities transferred by this Act may be disapproved by concurrent resolution) (S. 210) (Oct. 17, 1979)

EDUCATION AMENDMENTS OF 1974, Pub. L. No. 93-380, § 509 88 Stat. 484, 567, amending the General Education Provisions Act, Pub. L. No. 90-247, § 431, formerly § 421, 81 Stat. 783 [H.R. 7819], as added Pub. L. No. 91-230, § 401(a)(10), 84 Stat. 121, 169 [H.R. 514], renumbered, Pub. L. No. 92-318, § 301(a)(1), 86 Stat. 235, 326 [S. 659]; amended by, Pub. L. No. 94-142, § 7, 89 Stat. 773, 796 [S. 6] (limiting application to final standards; adding provision that failure of Congress to disapprove shall not represent or be evidence of approval), and Pub. L. No. 94-482, § 405, 90 Stat. 2081, 2231 [S. 2657] (conforming amendment based upon new definition of "regulation"), and Pub. L. No. 96-374, § 1302, 94 Stat. 1367, 1497 [H.R. 5192] (congressional disapproval of final regulations "in whole or in part"), and Pub. L. No. 97-35, § 533(a)(3), 95 Stat. 357, 453 [H.R. 3982] (exempting regulations relating to family contribution schedules), 20 U.S.C. § 1232(d)(1) (Supp. V 1981) (Department of Education regulations must lie before Congress for 60 days and may be disapproved by concurrent resolution) (H.R. 69) (Aug. 21, 1974)

EDUCATION AMENDMENTS OF 1978, Pub. L. No. 95-561, §§ 1212, 1409, 92 Stat. 2143, 2341, 2369, 20 U.S.C. §§ 927, 1221-3(e) (Supp. V 1981) (rules and regulations proposed under the Act relating to procedures for educational agencies and institution to submit information and minimum allotment of funds to schools in the defense dependents' education system may be disapproved by concurrent resolution) (H.R. 15) (Nov. 1, 1978)

EDUCATION AMENDMENTS OF 1980, Pub. L. No. 96-374, § 451(a), 94 Stat. 1367, 1445, amended by Pub. L. No. 97-35, § 533(a), 95 Stat. 357, 453, 20 U.S.C. § 1089(a)(2) (Supp. V 1981) (schedule of expected family contributions to be used in determing a student's need for financial assistance, and any amendments thereto, shall be transmitted to Congress at the time of publication in the Federal Register (for 1982 and years thereafter, on April 1 for proposed rules and June 1 for amended rules), which shall be effective on July 1 of the following year unless disapproved by either House prior to July 15 of the year of publication. A new schedule, taking into consideration recommendations made in the resolution of disapproval, shall be published within 15 days of the resolution. If within 15 days of the submission of the revised schedule, either House disapproves, the Secretary shall publish another revised schedule within 15 days. This procedure is repeated until neither Houses adopts a resolution of disapproval.) (H.R. 5192) (Oct. 3, 1980) [Note special procedures for 1984-85 only, Pub. L. No. 97-301, 96 Stat. 1400]

STUDENT FINANCIAL ASSISTANCE TECHNICAL AMENDMENTS ACT OF 1983, Pub. L. No. 97-301, §§ 6, 9, 96 Stat. 1400, 1401, 1403, 20 U.S.C. §§ 1078, 1089 (Supp. V 1981) (separate schedule for family contribution for academic year 1984-85 as established by the Secretary of Education shall be effective unless disapproved by either House within 30 days. The statute provides a formula if no separate schedule is established. Separate schedule is also required for 1983-84 subject to veto provisions of 20 U.S.C. § 1089) (S. 2852) (Oct. 13, 1982)

FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS, Pub. L. No. 93-443, §§ 408(c), 409, 88 Stat. 1263, 1301-02, 1303-4, amended by Pub. L. No. 94-283, § 304(a), (b), 90 Stat. 498, 26 U.S.C. §§ 9009(c), 9039(c) (Federal Election Commission rules and regulations governing presidential campaign funds may be disapproved by either House during 30-day review period) (FEC rules and regulations on presidential primary matching funds may be disapproved by either House during 30-day review period) (S. 3044) (Oct. 15, 1974)

FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1979, Pub. L. No. 96-187, § 109, 93 Stat. 1339, 1364, 2 U.S.C. § 438(d)(2) (Supp. V 1981) (rules and regulations of the Federal Election Commission may be disapproved by resolution of either House) (H.R. 5010) (Jan. 8, 1980)

FEDERAL RULES OF EVIDENCE, Pub. L. No. 93-595, § 2, 88 Stat. 1926, 1948, 28 U.S.C. § 2076 (any amendments by Supreme Court to Federal Rules of Evidence must be laid before Congress 180 days and may be disapproved by resolution of either House; but amendments may take effect earlier only if Congress enacts a statute to that effect and Supreme Court may not put into effect a rule affecting evidentiary privilege without a statute affirmatively approving such a privilege rule (these last two provisions are not legislative vetoes)) (H.R. 5463)

AIRLINE DEREGULATION ACT OF 1978, Pub. L. No. 95-504, § 43(f)(3), 92 Stat. 1705, 1752, 49 U.S.C. § 1552(f) (Supp. V 1981)(Section 1552(a)(1) authorizes the Secretary of Labor to make monthly assistance payments to employees who are deprived of employment or adversely affected as to compensation in connection with the termination of the CAB and transfer of its functions. Section 1552(d)(1) creates a right of first hire for protected employees who are terminated by air carriers. Section 1552(f)(1) authorizes the Secretary to issue implementing rules and regulations. Section 1552(f)(3) provides that final rules under § 1552 shall not be issued until 30 legislative days after submission to the Senate Committee on Commerce, Science and Transportation and the House Committee on Public Works. The final rule will become effective 60 legislative days after submission unless either House adopts a resolution stating that it disapproves the rule) (S. 2493) (Oct. 24, 1978)

FEDERAL TRADE COMMISSION IMPROVEMENTS ACT OF 1980, Pub. L. No. 96-252, § 21(a), 94 Stat. 374, 393, 15 U.S.C. § 57a-1 (Supp. V 1981) (Federal Trade Commission rules may be disapproved by concurrent resolution) (H.R. 2313) (May 28, 1980)

MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980, Pub. L. No. 96-364, § 102, 94 Stat. 1208, 1213, 29 U.S.C. § 1322(a) (Supp. V 1981) (every five years Pension Benefit Guaranty Corporation (PBGC) shall conduct study to determine premiums needed to maintain basic-benefit guarantee levels for multiemployer plans; if premium increase necessary, PBGC submits three revised schedules; Congress may approve either of two schedules by concurrent resolution and if it approves neither, then third alternative goes into effect two years after schedule was submitted to Congress, in addition, revised premium schedule proposed by PBGC for voluntary supplemental coverage may be disapproved by concurrent resolution) (H.R. 3904) (Sept. 26, 1980)

FARM CREDIT ACT AMENDMENTS OF 1980, Pub. L. No. 96-592, § 508, 94 Stat. 3437, 3449-50, 12 U.S.C. § 2121 (Supp. V 1981) (certain Farm Credit Administration regulations may be disapproved or delayed by resolution of either House) (S. 1465) (Dec. 24, 1980)

COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT OF 1980, Pub. L. No. 96-510, § 305, 94 Stat. 2767, 2809, 42 U.S.C. § 9655 (Supp. V 1981) (any rule or regulation promulgated or repromulgated under title I of the Act, entitled "Hazardous Substances Releases, Liability Compensation," must be transmitted simultaneously to the Senate and the House. If a concurrent resolution is adopted within 90 days by both Houses, or if one House adopts such a resolution within 60 days and the other House has not disapproved it within 30 days, the regulation shall not become effective. There are further complications in § 9655(b). The Secretary of Transportation is given authority by § 108(3) of title I to issue regulations denying entry to ports and other places to vessels which fail to meet financial responsibility requirements under § 108(1). Section 108(5) of title I states that

evidence of financial responsibility for motor carriers covered by the Act shall be governed by § 30 of the Motor Carriers Act of 1980, therefore § 305 may also affect motor vehicles) (H R 7020) (Dec 11, 1980)

NATIONAL HISTORIC PRESERVATION ACT AMENDMENTS OF 1980, Pub. L. No 96-515, § 501, 94 Stat 2987, 3004, 16 U.S.C § 470w-6 (Supp. V 1981) (regulation proposed by the Secretary of the Interior may be disapproved by concurrent resolution) (H R. 5496) (Dec. 12, 1980)

COASTAL ZONE MANAGEMENT IMPROVEMENT ACT OF 1980, Pub. L. No. 96-464, § 12, 94 Stat. 2060, 2067, 16 U.S.C. § 1463a (Supp. V 1981) (rules proposed by the Secretary of Commerce may be disapproved by concurrent resolution) (S. 2622) (Oct. 19, 1980)

FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE EXTENSION ACT, 1980, Pub L. No 96-539, § 4, 94 Stat 3194, 3195, 7 U S C § 136v (Supp. V 1981) (rules or regulations promulgated by the Administrator of the Environmental Protection Agency under the Federal Insecticide, Fungicide and Rodenticide Act may be disapproved by concurrent resolution) (H R 7013) (Dec 17, 1980)

MOTOR VEHICLE AND SCHOOLBUS SAFETY AMENDMENTS OF 1974, Pub. L. No. 93-492, § 109, 88 Stat. 1470, 1482-83, 15 U.S.C § 1410b(b)(3)(B) & (C) (forbids Secretary of Transportation from implementing any motor vehicle safety standard which is disapproved by concurrent resolution within 60 days of transmittal) (S. 355) (Oct. 27, 1974)

PRESIDENTIAL RECORDINGS AND MATERIALS PRESERVATION ACT, Pub. L. No. 93-526, § 104, 88 Stat. 1695, 1696-97, 44 U.S.C. § 2107 note (Administrator, within 90 days of enactment of Title, shall submit regulations governing public access to tape recordings and other materials; regulations are subject to disapproval resolution by either House; any change in regulations are subject to same veto procedures) (S. 4016) (Dec. 19, 1974)

AMENDMENT TO SOCIAL SECURITY ACT CHILD SUPPORT PROVISIONS, Pub. L. No. 94-88, § 208(d)(1), 89 Stat. 433, 436, 42 U.S.C. § 602 note (standards by Secretary of HEW for state plans relating to aid to families with dependent children shall require cooperation of recipient in establishing paternity and obtaining support payments unless the recipient has good cause, based upon best interests of the child on whose behalf aid is claimed, not to cooperate; proposed standards shall be effective 60 days after submission to Congress unless disapproved by either House) (H.R. 7710) (Aug. 9, 1975)

OMNIBUS BUDGET RECONCILIATION ACT OF 1981, CONSUMER PRODUCT SAFETY AMENDMENTS OF 1981, Pub. L. No. 97-35, §§ 1201(a), 1207, 95 Stat. 357, 718-20, 15 U.S.C. §§ 1204, 1276, 2083 (Supp. V 1981) (consumer product safety rule promulgated by Commission may not take effect if both Houses adopt concurrent resolution disapproving rule within 90 days or if one House within 60 days adopts concurrent resolution of disapproval and the other House does not disapprove within 30 days of transmittal; regulations promulgated by Commission under Federal Hazardous Substances Act and under Flammable Fabrics Act are subject to same concurrent resolution of disapproval procedures) (H.R. 3982) (Aug. 13, 1981)

EMERGENCY INTERIM CONSUMER PRODUCT SAFETY STANDARD ACT OF 1978, Pub. L. No. 95-319, § 3(a), 92 Stat. 386, 388, 15 U.S.C. § 2082(c)(2)(D)(iv) (Supp. V 1981) (Consumer Product Safety Commission's decision to postpone implementation of revisions to interim cellulose insulation safety standards may be overridden by negative vote of both appropriate House and Senate Committees) (S. 204) (July 11, 1978)

OMNIBUS BUDGET RECONCILIATION ACT OF 1981, RAIL PASSENGER SERVICE ACT, Pub. L. No. 97-35, §§ 1142, 1183(a), 95 Stat. 658-59, 695, 45 U.S.C. §§ 564(c)(3), 761, 767 (Supp. V 1981) (Secretary of Transportation may amend final proposal setting forth criteria under which National Railroad Passenger Corporation is authorized to add or discontinue routes and services by submitting to Congress draft amendments which shall take effect unless either House adopts a resolution of disapproval) (Secretary of Transportation required to submit a plan for sale of United States interest in common stock of Consolidated Rail Corporation

which shall be deemed approved after 60 days unless both Houses of Congress pass concurrent resolution of disapproval, if sale of Conrail en bloc is not feasible, Secretary may enter into freight transfer agreements which, 60 days after submission to Congress, shall be deemed approved unless either House passes a resolution of disapproval, Secretary has not yet submitted sale plan) (H.R. 3982) (Aug 13, 1981)

OMNIBUS BUDGET RECONCILIATION ACT OF 1981, AMENDMENT TO HIGHWAY SAFETY PROGRAMS, Pub. L. No. 97-35, § 1107(d), 95 Stat. 626, 23 U S.C. § 402(j) (Supp. V 1981) (Secretary of Transportation shall promulgate rule establishing programs determined most effective in reducing accidents and injuries, if either House of Congress disapproves by resolution, Secretary may not obligate funds to carry out this section for that or any subsequent fiscal year, unless specifically authorized to do so by statute) (H.R. 3982) (Aug. 13, 1981)

INTERNATIONAL NAVIGATIONAL RULES ACT OF 1977, Pub. L. No. 95-75, § 3(d), 91 Stat. 308, 33 U.S.C. § 1602(d) (Supp. V 1981) (proposed amendments to the International Regulations for Prevention, Collisions at Sea may be disapproved by concurrent resolution) (H.R. 1561) (July 7, 1977)

SOCIAL SECURITY AMENDMENTS OF 1977, Pub. L. No. 95-216, § 317(a), 91 Stat. 1509, 1539, 42 U.S.C. § 433(e)(2) (Supp. V 1981) (agreements to establish "totalization arrangements" between the U.S. Social Security system and analogous systems of foreign countries subject to disapproval by one-House veto within a 90-day period) (H.R. 9346) (Dec. 20, 1977)

HOUSING AND COMMUNITY DEVELOPMENT AMENDMENTS OF 1978, Pub. L. No. 95-557, § 324, 92 Stat. 2080, 2103, 42 U.S.C. § 3535(o) (Supp. V 1981) (all HUD rules and regulations are subject to a delay of up to 120 days if the appropriate committee reports out a resolution of disapproval) (S. 3084) (Oct. 31, 1978)

XIV.

APPROPRIATIONS ACTS

ENERGY AND WATER DEVELOPMENT APPROPRIATIONS ACT, 1982, Pub. L. No. 97-88, §§ 302, 504, 95 Stat. 1135, 1146, 1149 (proposed transfers between appropriations for certain activities must be submitted to the House and Senate Appropriations Committees and the appropriate authorizing committees for approval) (no funds may be used to implement, administer or enforce any regulation which has been disapproved pursuant to a resolution of disapproval duly adopted in accordance with applicable law) (H.R. 4144) (Dec. 4, 1981)

N.B.: The Department of Justice has taken the position that provisions such as the restriction on use of funds to implement, administer or enforce regulations that have been disapproved is unconstitutional insofar as it would be invoked by the exercise of power purportedly granted by any legislative veto device, at least if the exercise occurs subsequent to the enactment of the bill. See, e.g., Letter to Chairman Mark O. Hatfield, Senate Committee on Appropriations, from Robert A. McConnell, Assistant Attorney General, Office of Legislative Affairs re H.R. 4169 (Oct. 27, 1981).

APPROPRIATIONS -- DEPARTMENT OF THE INTERIOR -- FISCAL YEAR 1982, Pub. L. No. 97-100, § 307, 95 Stat. 1391, 1416 (no funds may be used to implement, administer, or enforce any regulation which has been disapproved pursuant to a resolution of disapproval duly adopted in accordance with applicable law; this provision is unconstitutional insofar as it purports to apply to regulations disapproved after enactment of the Act, see note supra) (H.R. 4035) (Dec. 23, 1981)

DEPARTMENT OF INTERIOR AND RELATED AGENCIES APPROPRIATIONS ACT, 1983, Pub. L. No. 97-394, Title II, §§ 310, 312, 96 Stat. 1966, 1985, 1987, 1989 (appropriation structure for the Forest Service may not be altered without approval of the House and Senate Committees on Appropriations) (transfers of funds by the Forest Service pursuant to 7 U.S.C. § 2257 must be approved by House and Senate Committees on Appropriations) (Secretary of

Energy must submit certain contracts or agreements to the House and Senate Appropriations Committees 30 days prior to effective date, committees may waive all or portion of period) (Secretary of Energy must submit contract agreements for research and development at Bartlesville Energy Technology Center to House and Senate Appropriations Committees 30 days prior to effective date; committees may waive all or portion of period) (H.R. 7356) (Dec. 30, 1982)

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT -- INDEPENDENT AGENCIES APPROPRIATIONS ACT, 1982, Pub. L. No. 97-101, National Aeronautics and Space Administration Research and Development Appropriation, 95 Stat. 1417, 1426 (appropriations for certain activities may not be used beyond specified amounts without approval of Committees on Appropriations) (H.R. 4034) (Dec. 23, 1981)

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT -- INDEPENDENT AGENCIES APPROPRIATIONS ACT, 1983, Pub. L. No. 97-272, National Aeronautics and Space Administration Research and Development Appropriation, National Science Foundation Research and Related Activities Appropriation, 96 Stat. 1160, 1169, 1171 (appropriations for certain activities may not be used beyond specified amounts without approval of Committees on Appropriations; no funds may be used for a fifth space-shuttle orbiter without approval of Committees on Appropriations) (no funds to be used for advanced ocean drilling program, and no more than $12 million for deep sea drilling project, without approval of Committees on Appropriations) (H.R. 6956) (Sept. 30, 1982)

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT -- INDEPENDENT AGENCIES APPROPRIATIONS ACT, 1983, Pub. L. No. 97-272, §§ 409, 413, 96 Stat. 1160, 1164, 1172, 1179 (no funds can be used by HUD to reorganize the Department without the prior approval of the appropriate committees; provision held to be unconstitutional in AFGE v. Pierce, No. 82-2372 (D.C. Cir. Dec. 8, 1982)) (Secretary of HUD and heads of agencies may provide funds to Neighborhood Reinvestment Corporation to implement Neighborhood Reinvestment Corporation Act, if approved by appropriate committees) (no

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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT -- INDEPENDENT AGENCIES APPROPRIATIONS ACT, 1984, Pub. L. No. 98-45, National Aeronautics and Space Administration Appropriation, ___ Stat. ____ (appropriations for certain activities may not be used beyond specified amounts without approval of Committees on Appropriations; NASA Administrator may authorize lease or construction of facility with approval of Committees on Appropriations) (H.R. 3133) (July 12, 1983)

DEPARTMENT OF TRANSPORTATION AND RELATED AGENCIES APPROPRIATIONS ACT, 1983, Pub. L. No. 97-369, Salaries and Expenses appropriations for Office of the Secretary, fourth proviso of Operations appropriation for FAA, second proviso of Rail Service Assistant appropriation for FRA, § 319, 96 Stat. 1765, 1768, 1772-73, 1783 (none of the funds in this Act are available for sale of government-owned Conrail securities without the prior consent of the House and Senate Committees on Appropriations) (FAA shall not undertake any reorganization of its regional office structure without the prior approval of both House and Senate Appropriations Committees) (none of the funds in this Act shall be available for the sale of Washington Union Station without the prior approval of the House and Senate Committees on Appropriations) (none of the funds in this Act shall be used to implement, administer, or enforce any regulation which has been disapproved pursuant to a resolution of disapproval duly adopted in accordance with the applicable law of the United States; this provision is unconstitutional insofar as it purports to apply to regulations disapproved after enactment of Act, see note supra p. 31) (H.R. 7019)

FOREIGN ASSISTANCE AND RELATED PROGRAMS APPROPRIATIONS ACT, 1982, Pub. L. No. 97-121, § 514, 95 Stat. 1647, 1651, 1655 (unnumbered section, 95 Stat. 1651, provides that no funds provided for the Special Requirements Fund shall be obligated without the prior written approval of the Appropriations Committees of both houses of Congress) (§ 514 provides that none of the funds made available by the Act may be obligated under an appropriation account to which they were not appropriated without the written prior approval of the Appropriations Committees of both Houses of Congress) (H.R. 4559)

DISTRICT OF COLUMBIA APPROPRIATIONS ACT, 1983, Pub. L. No. 97-378, § 123, 96 Stat. 1925, 1933 (prohibits reprogramming of appropriated funds unless advance approval is sought pursuant to method set forth in H.R. Rep. No. 443, which accompanied 1980 Appropriations Act, Pub. L. No. 96-93, and which requires that all programming requests be submitted to the House and Senate Appropriations Committees for approval if the dollar amount exceeds $50,000 annually or if the result of the proposal would entail an increase or decrease of 10 percent annually in the affected programs or projects. Both Committees must approve before reprogramming may take effect; if either Committee objects, reprogramming is denied) (H.R. 7144) (Dec. 22, 1982)

JOINT RESOLUTION MAKING CONTINUING APPROPRIATIONS FOR THE FISCAL YEAR 1982, Pub. L. No. 97-92, Title IV, § 109, 95 Stat. 1193 (reorganization of Bureau of Alcohol, Tobacco and Firearms after March 30, 1983 is subject to disapproval by appropriations committees) (H.R. Res. 370) (Dec. 15, 1981)

SUPPLEMENTAL APPROPRIATIONS ACT, 1982, Pub. L. No. 97-257, § 303, 96 Stat. 818, 873-74 (subjects presidential proposals to rescind, reserve, or defer funds available to maintain certain prescribed federal personnel levels to §§ 1012 and 1013 of the Impoundment Control Act of 1974, p. 8) (H.R. 6863) (passed over President's veto Sept. 10, 1982)

FURTHER CONTINUING APPROPRIATIONS ACT, 1983, Pub. L. No. 97-377, Title V, Title VII, §§ 101(b) & (f), 125, 96 Stat. 1830, 1846, 1868, 1906, 1907-08, 1913 (funds approved and available until September 30, 1984, for engineering development of a basing mode for the MX missile, or for testing of the MX missile, may not be obligated or expended until approved by concurrent resolution) (no funds can be used by the Department of Commerce to reimburse the working capital fund established pursuant to 15 U.S.C. § 1521 for any program, project, or activity which had not been performed as a central service, unless the House and Senate Appropriations Committees approve such use) (foreign assistance funds appropriated by 1982 Foreign Assistance and Related Agencies Appropriations Act for a specific purpose may not be reprogrammed without the prior approval of both Committees on Appropriations) (low income housing regulations on maximum development costs may not be implemented with appropriated funds unless certain provisions are waived by appropriate committees) (no appropriations or funds available under the Energy and Water Development Act, 1982, may be used to initiate or resume any project or activity for which appropriations, funds, or other authority were not available during fiscal year 1982 without prior approval of the Committees on Appropriations) (approval by Appropriations Committees required for certain NASA contracts exceeding specified dollar amounts) (H.R. Res. 631) (Dec. 21, 1982)

XV.

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OMNIBUS BUDGET RECONCILIATION ACT OF 1981, POST SECONDARY STUDENT ASSISTANCE AMENDMENTS OF 1981, Pub. L. No. 97-35, §§ 532d, 533, 95 Stat. 451-53, 20 U.S.C. §§ 1078, 1089 (Supp. V 1981) (Secretary shall submit annually a schedule of expected family contributions with respect to student loans under § 1078

and student assistance under § 1089 to each House; if either House adopts resolution of disapproval of schedule or amendments in whole or in part within three and 1/2 months of submission, Secretary shall publish new schedule within 15 days, procedure is repeated until neither House adopts resolution of disapproval) (H.R. 3982) (Aug. 13, 1981).

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION AUTHORIZATION ACT, 1983, Pub. L. No. 97-324, 96 Stat. 1597, §§ 103, 104 (Committees on Appropriations may waive requirement that 30 days elapse before Administration takes certain actions after reporting to Congress) (H.R. 5890) (Oct. 15, 1982).

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION AUTHORIZATION ACT, 1984, Pub. L. No. 98- , ___ Stat. ___, §§ 103, 104, 110 (Committees on Appropriations may waive requirement that 30 days elapse before Administrator takes certain actions after reporting to Congress) (H.R. 2065) (July 15, 1983)

ENACTMENT OF TITLE 44, UNITED STATES CODE, "PUBLIC PRINTING AND DOCUMENTS," Pub. L. No. 90-620, § 1, chap. 5, "Production and Procurement of Printing and Binding," 82 Stat. 1238, chap. 5, 44 U.S.C. §§ 501-17 (Joint Committee on Printing approves printing in field printing plants operated by Executive agencies, § 501) (Joint Committee approves non-GPO printing, binding, and blank-book work, § 502) (Joint Committee may permit GPO to authorize Executive agencies to purchase non-GPO printing, § 504) (Joint Committee establishes regulations for GPO to sell publication plates, § 505, as amended by Pub. L. No. 94-553, § 105(a)(1) (1976)) (Joint Committee fixes standards of paper, § 509) (Joint Committee determines minimum portions of each quality of paper, § 510) (Joint Committee awards paper and envelope contracts, § 511) (Joint Committee approves paper contracts, § 512) (Joint Committee may accept nonconforming paper at a discount, § 513) (Joint Committee resolves quality disputes between GPO and paper contractors, § 514) (GPO enters into new contracts "under direction of Joint Committee, § 515) (Joint Committee may authorize purchase of paper on open market, § 517) (H.R. 18612) (Oct. 22, 1968)

UNITED STATES INFORMATION AND EDUCATIONAL EXCHANGE ACT OF 1948, Pub. L. No. 80-402, 62 Stat. 6, § 1006, 22 U.S.C. § 1431 note (powers under this act relating to dissemination of information abroad by USIA may be terminated by concurrent resolution) (H.R. 3342) (Jan. 27, 1948)

APPENDIX A

LEGISLATIVE VETO STATUTES

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	1606	93-378	Forest and Rangeland Renewable Resources Planning Act of 1974	17
	3413	97-98	Agriculture and Food Act of 1981	24
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	1981(a)	87-794	Trade Expansion Act of 1962	8
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	1089(a)(2)	96-374, amended by 97-35, 97-301	Education Amendments of 1980	25,35
	1221-3(e)	95-561	Education Amendments of 1978	24
	1232(d)(1)	93-380, amended by 94-142 94-482 96-374 96-35	Education Amendments of 1978	25
	3474	96-88	Dept. of Education Organization Act	24
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	2151n	94-161	" " "	2

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	2429a	97-113	" " "	4
	2441 note	94-110	H R. J Res 683	1
	2587(b)	87-297	Arms Control and Disarmament Act of 1961	2
	2753(d)(2)	95-92	International Security Assistance Act of 1977	3
	2753(d)(2)(B)	97-113	International Security and Development Cooperation Act of 1981	4
	2755(d)	94-329	International Security Assistance and Arms Control Act of 1976	3
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28	2076	93-595	Federal Rules of Evidence	26
29	1322(a)	96-364	Multiemployer Pension Plan Amendments of 1980	27
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48	1705(c)	93-435	Conveyance of submerged lands to Guam, Virgin Islands, and American Samoa	19
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	1917	80-395	Taft Anti-Inflation Law	24
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	2091(e)(1)(B)	96-294	Energy Security Act, Defense Production Act Amendments of 1980	6
	2092	93-155	Dept. of Defense Appropriation Authorization Act, 1974	4
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APPENDIX 2

LETTER FROM PROFESSOR GRESSMAN TO CHAIRMAN ZABLOCKI ON EXISTING LEGISLATIVE VETO PROVISIONS IN THE FOREIGN AFFAIRS AREA WHICH MAY REMAIN CONSTITUTIONAL

THE UNIVERSITY OF NORTH CAROLINA
AT
CHAPEL HILL

SCHOOL OF LAW

The University of North Carolina at Chapel Hill
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August 26, 1983

The Honorable Clement J. Zablocki, Chairman
Committee on Foreign Affairs
United States House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

In response to your request at the Committee hearing on July 21, 1983, I submit this supplemental statement for the record. This statement concerns the existing legislative veto provisions, in foreign affairs statutes under this Committee's jurisdiction, that might still be deemed constitutional following the Supreme Court's ruling in Chadha.

A. The Chadha decision

I preface my supplemental statement with a recapitulation of the Chadha decision. As I explained at the July 21 hearing, legislative action under our constitutional form of government has developed at two distinct levels:

(1) The plenary level of legislation. Legislative action at this level involves the traditional processes of enacting statutes as specified in Article I, Section 7, of the Constitution. Under those provisions, both the House and the Senate must concur in approving legislative proposals for changing the legal status quo, subject to presentment to the President for approval or veto (plus possible override of a veto). Legislation resulting from such bicameral/presentment processes obviously meets the Chadha definition of legislative action — action that is "essentially legislative in purpose and effect" by altering "the legal rights, duties and relations of persons . . . outside the legislative branch." And it is that kind of legislative action that Chadha says must comply with the Article I bicameral/presentment requirements.

(2) The secondary or quasi level of legislation. Legislative action at this level is not expressly provided for or contemplated by Article I, Section 7, of the Constitution. Action has developed at this level only for the past century, marked by the rapid growth of what we call administrative law and lawmaking. In short, this is the level of delegated lawmaking authority within the structure and bounds of a duly enacted plenary statute. At this level, administrative agencies and executive officials perform certain delegated lawmaking functions, the products of which the courts call quasi-legislation or mini-legislation. These functions normally can be performed only in strict compliance with the standards and limitations set forth by Congress in the plenary statute; indeed, such actions by the administrators and officials have the effect of law only if Congress so provides. Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979).

The important point about this secondary or quasi level of delegated lawmaking is that the resulting quasi-legislation, when given the effect of law by the authority of Congress, has never been subject to the bicameral/presentment procedures of Article I, Section 7. That still is true in the post-Chadha era, at least to the extent that Congress delegates final and total lawmaking authority. But if Congress, by statute, seeks to qualify or limit the delegation so that the quasi-legislation achieves finality as a rule of law only after Congress (1) has reviewed the proposed action of the administrator or official, and (2) has approved that proposal by not disapproving or vetoing it, Chadha holds that Congress can approve or disapprove only by following the bicameral/presentment route of plenary legislation. In effect, therefore, Chadha requires Congress to follow the plenary legislation procedures whenever it wants to review, approve or disapprove quasi-legislative proposals that are "essentially legislative in purpose and effect." The anomolous result is that the delegated quasi-lawmaking authority of agencies and officials must now be deemed authority to issue final quasi-rules of law that need not follow the bicameral/presentment route. Only if Congress seeks to inject itself in some manner in the administrative process as a condition precedent to the finality of administrative action do the bicameral/presentment procedures become activated at this secondary level.

Much of the Chadha rationale is premised on a misreading of congressional intent with respect to the deportation procedures there involved, as well as a misreading of the critical statutory language in issue. Congress simply never intended to give the Attorney General final authority to grant permanent resident status to an otherwise deportable alien. But that only demonstrates the adeptness with which the Supreme Court went about achieving the constitutional result it desired, to wit, restricting the legislative actions of Congress to the bicameral/presentment processes — and without regard to whether Congress is dealing with plenary legislative matters or quasi-legislative matters. One of the lessons to be learned from Chadha is that it matters more what Congress does than what it says in a statute. And if Congress does something that looks like an alteration of the legal rights, duties or relations of others, the Court is likely to hold that the bicameral/presentment procedures must be followed, whatever the statute says and however quasi-legislative its actions may be.

B. Impact of Chadha

As I testified at the July 21 hearing, Chadha generally outlaws the use of the one or two-House veto device, including concurrent resolutions of approval or disapproval, that have the effect of altering the "legal rights, duties and relations" of persons or officials outside the legislative branch. That holding seems to dictate that provisions in foreign affairs statutes for employment of concurrent resolutions be stricken, to be replaced by joint resolutions of approval. The practical effect of adopting the joint resolution of approval technique, which embodies the bicameral/presentment procedures of Article I, Section 7, is virtually the same as occurs when the invalidated veto procedures are used. That is, the failure or refusal of one

House to approve the joint resolution means that the proposed action of the Executive does not become effective.

I must make an additional comment with respect to substituting the joint resolution of approval device. I believe it also must be made crystal clear, in each statute where the device is to be used, that the executive action subject to joint resolution approval is either (a) nonfinal, (b) temporary in effect, or (c) a proposal for future action — all conditioned as to finality and permanent effect upon the enactment of a joint resolution of approval.

I also suggested at the July 21 hearing that, while it is safer and perhaps more prudent to adopt the joint resolution of approval device in light of Chadha, there is a possible exception to Chadha, particularly in the foreign affairs area of legislation. It seems to me that when Congress deals with (a) the authorization and appropriation of money for use in (b) the conduct of foreign affairs, Congress is at the height of its constitutionally exclusive powers. We are then in the area of "political question" functions textually committed by the Constitution to the Congress. In addition, when Congress conditions the Executive's use of public funds (or disposal of government property) upon possible congressional disapproval by concurrent resolution, it is arguable that Congress, if it disapproves, is not thereby affecting the "legal rights, duties and relations" of the Executive in the Chadha sense. Certainly the Executive has no "legal right" or "duty" to spend public funds on a foreign venture contrary to congressional authorization. And while Chadha does not make clear what is meant by effecting the "relations" of those outside the legislative branch, it is arguable that the "relations" of the Executive to Congress in the expenditure of public funds in foreign affairs matters are exactly what Congress says they are. In this context, the President can spend public funds or dispose of public property only if, as and when Congress so authorizes, and on such conditions and subject to such disapproval as Congress may provide by law. Such, then, would appear to be the dimensions of the Executive's "relations" in this area of governmental power. If so, the Chadha rationale becomes inapplicable, and Congress may adopt any kind of review and disapproval device it deems appropriate.

I repeat that the foregoing possibility of avoiding the Chadha rationale is as yet only argumentative in nature. It is too early to have had it tested or sanctioned by any court. And it is probably the better part of prudence to make use of the joint resolution of approval device. Nonetheless, the following statutes that authorize or appropriate public funds, or permit disposal of public property, in foreign affairs matters would appear subject to this arguable analysis:

1. 1983 Foreign Aid Bill, H.R. 2992: Secs. 122(e), 122(f), 122(g), 122(j), 122(k), 536(e), 536(e)(2), 536(e)(3).

2. Foreign Assistance Act of 1961, Sec. 617, 22 U.S.C. 2367.

3. International Development and Food Assistance Act of 1975, Secs.

302(2), 310, 22 U.S.C. 2151a, 2151n [including committee vetoes].

4. International Security Assistance and Arms Control Act of 1976, Secs. 211, 301(a), 302(a) and (b), 22 U.S.C. 2304(c)(3), 2314(g)(4)(C), 2755(d), 2776(b).

5. International Security Assistance Act of 1977, Secs. 16, 20, 22 U.S.C. 2753(d)(2) [involves transfer of defense equipment or services rather than public funds].

6. International Security and Development Cooperation Act of 1981, Secs. 109(a), 102(a), 737(b) and (c), 22 U.S.C. 2796b, 2753(d)(2)(B), 2429(b)(2) and 2429a.

7. Rubber Producing Facilities Disposal Act of 1953, Sec. 9, 50 U.S.C.App. 1941(g) [involving sale of facilities].

8. Disposal of Surplus Vessels and Other Naval Property, Sec. 6, 10 U.S.C. 7308, 7545 [involving proposed transfer of naval property].

I am not sure that I have covered all the foreign affairs statutes, dealing with the appropriation of public funds or the disposal of government property, that contain veto provisions. Those that I have not mentioned seem to me to direct the veto provisions toward Executive decisions respecting substantive matters of policy. Such statutory provisions might implicate the Chadha description of the duties and relations of the President that Congress can review or disapprove only through the bicameral/presentment processes.

I shall be glad to answer any further questions the Committee might have.

Sincerely,

Eugene Gressman

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APPENDIX 3

SUMMARY AND PRELIMINARY ANALYSIS OF THE RAMIFICATIONS OF INS V. CHADHA, THE LEGISLATIVE VETO CASE, BY MORTON ROSENBERG, SPECIALIST IN AMERICAN PUBLIC LAW, AMERICAN LAW DIVISION, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS

SUMMARY AND PRELIMINARY ANALYSIS OF INS v. CHADHA, THE LEGISLATIVE VETO CASE

In a long anticipated[1/] decision in INS v. Chadha, the Supreme Court on June 23, 1983 ruled by a 7-2 vote[2/] that the one-House legislative veto contained in Section 244(c)(2) of the Immigration and Nationality Act is unconstitutional. While the substantive ruling was not unexpected, the reach of the Court's rationale came as a surprise to many. The encompassing nature of the ruling is reflected in Justice Powell's observation in his concurrence that "the Court's decision... apparently will invalidate every use of the legislative veto. The breadth of this holding gives one pause," and Justice White's statement in dissent that the Court's rationale "sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a legislative veto."

These statements of the Justices, unchallenged by the majority, would not appear to be hyperbole. The majority opinion emphatically eschews reliance on the narrower separation of powers rationale

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1/ The case was argued initially on February 22, 1982 and then was held over for reargument in the Court's 1982-83 term on December 7, 1982. The decision of Ninth Circuit which was the subject of the appeal was rendered in December 1980.

2/ Chief Justice Burger delivered the opinion of the Court joined by Justice Brennan, Marshall, Blackmun, Stevens and O'Connor. Justice Powell concurred in the judgment on a narrower constitutional ground than that of the majority. Justice White dissented in an opinion supporting the validity of the veto. Justice Rehnquist dissented based on his view that the veto provision was inseverable from the process Congress created to permit suspension of deportation and thus, presumably, Chadha lacked standing to sue.

utilized by the court of appeals below.[3] Rather the opinion for the Court rests upon the view that the constitutional mandate of bicameral consideration and presentment to the President for his signature or veto is a universal requirement for all exercises of legislative power which it broadly defines as actions which "alter[] the legal rights, duties and relations of persons ... outside the legislative branch."[4]

As consequence, the Court appears to have precluded future consideration of the constitutionality of other congressional review provisions based upon their differing substantive contexts and circumstances -- a case by case approach -- which would have necessarily followed from a holding resting upon a separation of powers rationale. Instead, the Court's Article I analysis apparently invalidates all legislative vetoes irrespective of their form or subject, thus sweeping away an instrument of legislative oversight that over the past 50 years that has been applied to virtually every field of governmental concern: reorganization, budgets, foreign affairs, war powers, and the regulation of trade, safety, energy, the environment and the economy. The "decision strikes down in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated in its history."[5]

3/ The Ninth Circuit's opinion carefully circumscribed the scope of its holding, limiting it to the facts and circumstances that were before the court. "We are not here faced with a situation in which the unforeseeability of future circumstances or the broad scope and complexity of the subject matter of an agency's rulemaking authority preclude the articulation of specific criteria in the governing statute itself. Such factors might present considerations different from those we find here, both as to the question of separation of powers and the legitimacy of the unicameral device." Chadha v. INS, 634 F.2d 408, 433 (9th Cir. 1980).

4/ Majority opinion at p. 32.

5/ Dissenting opinion, White, J. at 38. Appendix I contains a listing of statutory review provisions that may be affected by the ruling.

This report will outline and analyze the Court's holding and rationale and then attempt to assess its impact on the legislative and administrative processes and inter-branch relations.

I. The Decision

A. The Statute, the Circumstances of the Case, and the Ruling of the Ninth Circuit

At issue in Chadha was the constitutionality of section 244(c)(2) of the Immigration and Nationality Act of 1952[6/] providing for a one-House veto of agency suspensions of deportation. The veto had been exercised by the House of Representatives,[7/] thereby requiring the deportation of petitioner Chadha. A unanimous three-judge panel of the Court of Appeals for the Ninth Circuit held that "the statutory mechanism reviewed here violates the constitutional doctrine of separation [of powers] because it is a prohibited intrusion upon the Executive and Judicial branches."[8/]

The essential findings of the court were as follows. Chadha, a native of Kenya and holder of a British passport, lawfully entered the United States on a student visa which expired in 1972 after he completed his degree studies. In 1974 the INS initiated deportation proceedings. At a hearing before a special inquiry officer pursuant to INA section 242(b),[9/] Chadha conceded his deportability but requested a suspension of deportation pursuant to INA section 244(a)1).[10/] The request was granted by the special

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6/ 8 U.S.C. 1254(c)(2) (1976).

7/ H. Res. 926, 94th Cong., 1st Sess. (1975), 121 Cong. Rec 40800 (December 16, 1975).

8/ 634 F.2d at 420.

9/ 8 U.S.C. 1252(b) (1976).

10/ 8 U.S.C. 1254(a)(1) (1976), 8 C.F.R. 242.17(a) (1979).

inquiry officer upon his finding that Chadha had submitted sufficient evidence to meet the three requirements of section 244(a)(1): he had resided in the United States for over seven years, was of good moral character, and would suffer extreme hardship if he were to be returned to his native land. In this latter regard the special inquiry officer found that "it would be extremely difficult, if not impossible, for [Chadha] to return to Kenya or to go to Great Britain by reason of his [East Indian] racial derivation.[11/] The grant of the requested relief triggered the congressional review requirements of INA section 244(c)(2) which subjected the suspension decision to possible reversal on the negative vote of either House of Congress. This occurred on December 16, 1975 when the House of Representatives passed H. Res. 926 disapproving the suspension of Chadha's deportation.[12/] Chadha's deportation proceeding was thereafter reopened and the special inquiry officer entered a final order of deportation. Following denial of his appeal to the Board of Immigration Appeals, he petitioned the appeals court for review.

For the appeals court the process of congressional review, entailing an ad hoc, non-reviewable scrutinization of the application of both the statutory and equitable standards which had evolved as a result of a longstanding process of administrative and judicial interpretation, raised the question whether the one-House veto mechanism violated the constitutional principle of separation of powers by intruding unnecessarily into essential executive or judicial functions. The court concluded that it did. It found an impermissible intrusion on the judicial function by its assumption of the task of correcting misapplications of

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11/ 634 F.2d at 411.

12/ Supra, note 27.

the law. Congress, the court reasoned, had arrogated to itself the power to alter standards of judgment in individual adjudications, as well as the result of those adjudications, without any attempt to change the rules of the game for others who will be similarly situated in the future.[13/] The court also found that if the veto device is viewed as a means of filling the gaps or omissions in statutory criteria and thereby aiding in executive implementation of statutory policy, it is defective because it is an unlawful assumption by the legislature of typical day-to-day enforcement functions of the Executive.[14/] The substantive basis for the court's decision is thus in marked contrast to three subsequent rulings of the Court of Appeals for the District of Columbia[15/] which grounded rulings of unconstitutionality of one and two-House veto provisions on the Presentment Clause alone.

B. Preliminary Rulings of the Supreme Court Severability

Initially, the High Court disposed of a variety of procedural issues challenging its authority to reach and resolve the substantive question of the case[16/] Since only the severability issue would appear to raise practical concerns for future litigation and congressional action, it alone will be treated here.

13/ 634 F.2d at 430-31.

14/ 634 F.2d at 432.

15/ Consumer Energy Council of America v. FERC, 673 F.2d 425 (D.C. 1982), appeals docketed Nos 82-2151 etc., 50 U.S.L.W. 3949 (U.S. 5121/82), Consumers Union, Inc. v. FTC, 691 F.2d 575 (D.C. Cir. 1982) (en banc), jurisdictional statement filed (U.S. 12/6/82), AFGE v. Pierce, 697 F.2d 303 (D.C. Cir. 1982).

16/ Challenges were raised as to the Court's jurisdiction, Chadha's standing, the effect of the availability of other statutory avenues of relief for Chadha, the lack of jurisdiction of the court below, the absence of a case or controversy, and the presence of a political question.

The congressional petitioners argued that the legislative history of the provision providing for a process of suspension of deportation demonstrated that Congress would not have enacted the provision absent the veto mechanism As a consequence, it was contended, the entire suspension process, being inextricably tied to the congressional review device, must fall. Therefore, the Attorney General would no longer have any authority to suspend Chadha's deportation. If so, Chadha would lack standing to challenge the constitutionality of the veto since he could receive no relief even if his challenge proved successful.

The Court rejected the contention on the basis of a broad severability provision contained in the Immigration Act and its reading of the legislative history of the suspension provision The severability clause provides

> If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby 17/

The Court held that the unambiguous and broad nature of the language raised "a presumption that Congress did not intend the validity of the Act as a whole, or any part of the Act, to depend upon whether the veto clause was invalid", 18/ which was supported by the legislative history of the provision. In its reading of that history, the critical element for the Court was Congress' "irritation with the burden of [having constantly to deal with a flood] of private immigration bills" 19/ and its desire to rid itself of

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17/ 8 U S C 1101 (1976)

18/ Majority Opinion, at p 11.

19/ Id. at p 13

that burden. It found "insufficient evidence that Congress would have continued to subject itself to the onerous burdens of private bills had it known that section 244(c)(2) would be held unconstitutional."[20/] Since what remains of the statutory provision is a "workable administrative mechanism",[21/] the Court concluded that it was severable.

Justice Rehnquist, in dissent, read the legislative history differently. He saw in that history an effort by Congress to rid itself of the burden of private bills but only if it retained a final say. "Congress consistently rejected requests from the Executive for complete discretion in this area. Congress always insisted on retaining ultimate control, whether by concurrent resolution, as in the 1948 Act, or by one-House veto, as in the present Act. Congress has never indicated it would be willing to permit suspensions of deportation unless it could retain some sort of veto."[22/]

Many statutues containing veto provisions either have no severability clauses or they are not as broadly cast as the one in Chadha. For example, the Impoundment Control Act does not contain such a provision but the War Powers Resolution does. Both, however, can be seen as basically similar in that they essentially only prescribe the congressional procedure for approval of the exercise of the subject delegated authority and were passed to resolve a serious constitutional conflict over asserted inherent authority by the President in the areas of spending and emergency military responses. It would seem unlikely that the Court would rule differently in each situation simply on the basis of the presence or absence of a severability clause. In any event, the Court has consistently held that even the

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20/ Id.

21/ Id. at 14.

22/ Dissenting Opinion (Rehnquist) at p. 4.

presence of such provisions does not conclusively resolve the issue.[23] The ultimate test is whether Congress would have enacted the provision in question independently of the portion that has been found unconstitutional.[24] Thus, how the Court will interpret the legislative history in particular circumstances, a task the Court described as an "elusive inquiry",[25] is not resolved by Chadha. One might argue that the strength of the legislative history of the Immigration Act in support of inseverability, notwithstanding the majority's characterization of the congressional emphasis, indicates a predilection for severance. On the other hand, where a veto is seen as integral to the congressional scheme, as might be said to be the case with Impoundment Act and War Powers Resolution processes,[26] the entire process may be held to fall. At present, it it would appear that a case by case disposition is in the offing and perhaps a lengthy period of uncertainty as to the extent of powers that may still be exercised by the President and the administrative agencies that are affected.

C The Constitutional Issue

The Supreme Court found the one-House veto unconstitutional because it was an exercise of legislative power which did not follow the constitutionally prescribed lawmaking process bicameral consideration of the action and presentation of the product of that action to the President

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23/ See, e.g., Carter v. Carter Coal Co., 298 U.S. 238, 312 (1936), United States v Jackson, 390 U S. 570, 585 n 27 (1967).

24/ Buckley v. Valeo, 424 U.S 1,108 (1976), Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 234 (1932)

25/ Majority opinion at p. 11.

26/ See discussion of the legislative histories of these statutes, infra at Appendix II See also AFGE v Pierce, 697 F.2d 303 (D C Cir 1982), holding an invalid committee veto provision inseverable from the appropriation to which it was attached

for his signature or veto. More particularly, the Court pursued the following process of analysis.

At the outset the Court rejected reliance on the efficiency, convenience, or utility of such devices in facilitating the functions of government, or their wide use over a long period of time, as an insufficient basis to support the veto in the face of explicit and unambiguous constitutional provisions which prescribe the respective functions of Congress and the Executive in the legislative process. The critical inquiry for the Court involved the nature of the veto itself. That is, is it a species of lawmaking action and, if so, is there any reason for holding that it was a variety of lawmaking that need not conform to the traditional requirements for passage of a law. To answer this the Court analyzed the nature and purpose of the constitutional lawmaking process.

Article I, section 7 provides that the fundamental prerequisites to the enactment of federal laws are bicameral passage of the legislation and presentation for approval or disapproval by the President. The purposes underlying these requirements, the Court declared, are integral to the constitutional design for the separation of powers and demonstrate an overriding constitutional concern to restrain legislative action. The reasons for the presidential veto are three-fold to provide the President with a defensive weapon against potential legislative intrusions on the powers of the Executive, as a check against the enactment of "oppressive, improvident, or ill-considered measures", and to assure the presence of a national perspective that the one official elected by a national constitutency might provide.[27/] Bicameralism also was seen as resting on a three-pronged rationale. it assures careful and full consideration by

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27/ Majority opinion at pp. 26-28.

the nation's elected officials, it satisfies the felt "need to divide and disperse power in order to protect liberty"; and it serves to protect the respective interests of the small and large states.[28/] The Court concluded that the bicameralism and presentment requirements serve interrelated and essential constitutional functions and "represents the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure."[29/]

The Court then turned to the critical definition of a legislative act. Whether an action is an exercise of legislative power will depend on its purpose and effect and not on its form. It concluded that where such action has "the purpose and effect of altering legal rights, duties and relations of persons ... outside the legislative branch" it must be effected through the constitutionally mandated lawmaking process.[30/] The Court reasoned that absent the veto provision, neither House acting alone, nor both acting together, could have required the Attorney General to deport Chadha after he had determined that Chadha should remain. It could only have been done, if at all, by another enactment.[31/] Moreover, the nature of the action itself, a policy choice as to how exceptions to deportations are to be made, can be accomplished only in accordance with the Article I procedure, in the same way that the original policy determination to delegate decisionmaking authority in this area to the Attorney General was made.[32/]

28/ Id. at pp. 28-30.

29/ Id. at p. 31.

30/ Id. at p. 32.

31/ Id. at p. 32-33.

32/ Id. at p. 34.

The Court went on to note that in only four instances does the Constitution allow one House to act alone[33/] thus demonstrating that when the Framers intended a departure from the prescribed process it did so in an explicit, unambiguous manner. Moreover, these exceptions were found to be "narrow, explicit, and separately justified,"[34/] and fail to support the departure from the norm in this case.

Finally, the majority rejected Justice White's suggestion in his dissent that the suspension of deportation be treated as a proposal for legislation and that the one-House rejection is simply a failure to achieve passage. That suggestion, the Court said, would effectively amend the Article I process since it would "allow Congress to evade the strictures of the Constitution and in effect enact Executive proposals into law by mere silence."[35/]

The Court concluded that that although the path it had marked for the Congress was a more narrow and burdensome manner of achieving efficient government, it was a choice dictated by Framers and one that most effectively restrained the arbitrary exercise of power.

> The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked.

33/ The Court referred to the initiation of impeachments by the House, the power to conduct impeachment trials on charges initiated by the House; the Senate's power to confirm presidential appointments; and the Senate's power to ratify treaties negotiated by the President.

34/ Majority opinion at p. 36.

35/ Id. at p. 38 ft. 22.

> There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided, either by the Congress or by the President. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution. 36/

36/ Id. at p. 39.

II Potential Ramifications of the Decision

A The Scope of the Court's Decision

As has been indicated, the Court made no effort to circumscribe the reach of its opinion and the underlying rationale has an undeniably broad sweep. At its minimum, the decision condemns all existing one-House vetoes. Certainly it would also encompass any committee or chairman vetoes directed at agency decisionmaking But the Court's rationale also leaves little or no room to distinguish a two-House veto Compliance with the bicamerialism requirement, under the Court's reasoning, is insufficient to cure the failure to comply with Article I, section 7 requirements because in the constitutionally prescribed lawmaking process, bicameralism and presentment are inextricably combined in pursuit of the discerned constitutional purpose of constraining the exercise of federal legislative power Thus it may be presumed that all congressional veto provisions are now constitutionally suspect[37/] notwithstanding the manner in which they are exercised or the subject matter they cover.[38/]

B. Severability

The invalidity of a veto provision of a particular enactment will not end all inquiry That is to say, the unconstitutionality of a congressional review mechanism will not automatically bring down the entire statute of which it is a part. By the same token, it cannot be presumed that the offending provision is simply excised, leaving the remainder intact. And, as has

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37/ See Appendix I for a listing of such provisions

38/ On July 6, 1983 the Court summarily affirmed the District of Columbia Circuit Courts' decisions in CECA v. FERC and Consumers Union v. FTC, supra, note 15, which invalidated one and two-House vetoes in rulemaking situations. The Court's action would therefore appear to conclusively support the supposition of the text.

been previously discussed,[39] the presence of a severability clause may not be determinative. Thus, much will depend on a case-by-case examination of the legislative histories of the statutes in question to determine whether Congress would have delegated the authority involved without the review mechanism. Absent such a clear indication of congressional intent, the question ultimately may turn on whether, on the face of the statute, the veto is an inextricable part of the whole, or, if what remains of the statutory provision without the review provision "is a workable administrative mechanism". Resolution of these questions is, of course, of vital importance. Where only the veto provision is excised, thereby leaving the Executive with a now unencumbered power, Congress may be faced with the possibility that it will have to muster two-thirds majorities to retrieve a delegated authority that the President wishes to retain.

Even where there is a strong likelihood that an entire statutory scheme will be brought down by the invalidity of its veto provisions, as may be the case in the areas of impoundment and possibly war powers,[40] the void left by elimination of a hard gained political accommodation may raise a host of other legal problems. Thus, a possible imminent source of confrontation in this era of budget cutting could arise in the area of deferral of appropriated funds now controlled by congressional review provisions contained in the Budget and Impoundment Control Act of 1974.[41] Passage of that legislation

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39/ Supra, pp. 5-8.

40/ Appendix II provides brief legislative histories of the War Powers Resolution and Impoundment Control Act of 1974. Those histories indicate that Congress intended the congressional review provisions to be an integral part of its legislative scheme.

41/ Pub. L. 93-344, 88 Stat. 297, 31 U.S.C. 1400-1407 (1976).

was precipitated in part by presidential manipulation of the appropriations process and assertion of an inherent authority to impound appropriated funds. Litigation prior to the passage of the Impoundment Act never definitively resolved the issue of the scope of presidential power in this area.[42/] Doubt as to the continued validity of the statutory deferral process, coupled with frustration with the pace of congressional budget cutting, could encourage new Executive explorations as to the limits of the President's inherent impoundment authority. A similar confrontation might arise with respect to the potential ineffectiveness of the control mechanism that is part of the War Powers Resolution scheme. Here, and perhaps with all other now failed review provisions, the President might employ the tactic adopted by President Carter in 1978 when he announced that he would treat all existing and future legislative veto devices as "report and wait" provisions,[43/] thereby shifting the burden of response to the Congress.

42/ See Local 2677, American Federation of Government Employees v. Phillips, 358 F. Supp. 60 (D.D.C. 1973), and Guadamuz v. Ash. 368 F. Supp. 1233, 1243-44 (D.D.C. 1974) holding that the President had no inherent authority to impound. All other reported cases dealt with the issue whether the statute in question specifically permitted impoundment. They were generally found not to have granted such authority. See, e.g., Train v. City of New York, 420 U.S. 136 (1975); State Highway Commission of Missouri v. Volpe, 479 F.2d 1099 (8th Cir. 1973), but see Pennsylvania v. Lynn, 501 F.2d 848 (D.C. Cir. 1974)

43/ I Pub. Papers of the Presidents - Jimmy Carter 1146 (1978), 124 Cong. Rec. H5879-80 (daily ed. June 21, 1978).

C Impact on Congressional Review and Oversight Tactics

Chadha, of course, mandates a congressional shift in review and oversight tactics. The range and variety of possible actions is great Most obviously Congress may void an administrative action by the exercise of its legislative power To avoid the possibility of a presidential veto to as great an extent as is possible, we may see an even more extensive use of riders to appropriations bills than has been the case in the past to effect this purpose. Or, if an expedited legislative process is desired, the Congress might turn in particular circumstances to a Levin-Boren type veto which provides an expedited process leading to passage of a joint resolution, which was specifically approved by the CECA decision[44/] and is implicitly valid under Chadha. Its advantages are that it avoids allegations of constitutional infirmity by providing for two-house participation and presidential veto and is speedier than the normal legislative process On the other hand reversal of executive action may require passage by an extraordinary majority if the President exercises his veto Moreover, the expedited procedure normally provided arguably runs counter to the deliberative nature of the legislative process

New legislation may be expected to be more detailed, where possible, and explicit and circumscribed in its delegations of authority Also, future delegations may be more frequently accompanied by "report and wait" requirements which would allow time for Congress to respond to administrative initiatives. Further, Chadha might have the effect of reviving variations of the

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44/ CECA v FERC, 673 F.2d 425, 470 (D C Cir 1982).

sunset concept. In the area of rulemaking, for example, in appropriate circumstances, new or old authority could be made to expire after a prescribed period. Such durational requirements would place the burden on agencies to justify renewal.

Chadha may be expected to spur more vigorous committee oversight. This might be aided by more coordination between committees with overlapping agency jurisdiction. Also, measures may be taken to make more certain that information needed by committees from executive agencies is obtained with proper dispatch. Legislation might be considered to ensure the ability of Congress, through its own House counsel, to enforce subpoenas in Federal district court. A civil remedy might be made available as an alternative to criminal contempt. Prosecution of contempt of Congress citations might either be made mandatory by the United States Attorney or, if it involves an executive officer, might be placed with a special prosecutor. The monitoring of agency rulemaking activities by committees might be assisted by the establishment of a select committee which would serve as an adjunct to standing committees.45/

Finally, Chadha might engender a revival of interest in the Bumpers Amendment, a proposal which would enlist the assistance of the courts in agency rulemaking oversight by removing the presumption of validity for any rule and imposing a more rigorous standard of judicial review for agency rulemakings. While such a proposal would certainly result in closer judicial scrutiny of agency rulemakings for conformance with congressional

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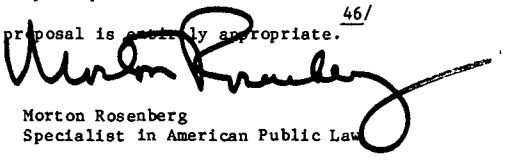
45/ Such a committee was suggested by the House Committee on Rules in 1980. See "Recommendations on Establishment of Procedures for Congressional Review of Agency Rules", House Committee on Rules, 96th Cong., 2d Sess. (Committee Print, March 1980).

intent, it also may have the effect of imposing substantial delay in the administrative process. Additionally, it may be questioned whether the role contemplated for the judiciary under the proposal is entirely appropriate. 46/



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46/ See Natter & Rosenberg, "Scope of Judicial Review of Agency Rulemaking: A Review and Assessment of Pending Congressional Proposals for Change (CRS, August 24, 1982).

APPENDIX I

STATUTES WHICH CONTAIN LEGISLATIVE VETO PROVISIONS IN EFFECT IN

June, 1983

1936-December 31, 1975

Source "Congressional Review, Deferral, and Disapproval of Executive Actions· A Summary and an Inventory of Statutory Authority," Congressional Research Service Report No. 76-88 G (April 30, 1976), by Clark F. Norton

Numbers in the margin of this report correspond to the numbers of statutes listed in the source.

3 Charges for Irrigation on Indian Reservation Projects, 1936 (P.L. 74-742, 25 U.S.C. Section 381, 49 Stat. ch. 692, pp. 1803-1804)
(Two House Approval)

16. Strategic Materials Stockpiling Act Amendments, 1946 (P.L. 79-520, 50 U.S.C. Section 98, 60 Stat. ch. 590, pp. 596-598)
(Two House approval)

23 Government Printing and Binding Amendment, 1949 (P.L. 81-156, 44 U.S.C. Section 111, 63 Stat. ch. 296, pp. 405-406)
(Joint Committee on Printing approval)

25. Federal Civil Defense Act of 1950 (P.L. 81-920, 50 App. Section 2281, 64 Stat. ch. 1228, pp. 1245-1249)
(Two House disapproval)

28. Immigration and Nationality Act of 1952 (P.L. 82-414, 8 U.S.C. § 1254, 66 Stat. ch. 477, pp. 163, 216, 217)
(One House disapproval)

36. Atomic Energy Act of 1954 (P.L. 83-703, 42 U.S.C. Section 2091, 68 Stat. ch. 1073, pp. 922) */
(Two committees may waive waiting period)

43. Watershed Protection and Flood Prevention Act Amendment, 1956 (P.L. 84-1018, 16 U.S C. Section 1005, 80 Stat. ch. 1027)
(One committee disapproval, the Watershed Protection and Flood Control Prevention Act Amendment, 1965 (P.L. 89-337), number 88, amends this statute with respect to projects subject to the legislative veto)

46. Small Reclamation Projects Act Amendment, 1957 (P.L. 85-47, 43 U.S.C. Section 422d(e), 71 Stat. pp. 48-49)
(One committee disapproval)

47 Atomic Energy Act Amendment, 1957 (P.L 85-79, 42 U.S.C. Section 2078, 71 Stat. pp. 274-275) */
(Two committees may waive waiting period)

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*/ Although the Joint Committee on Atomic Energy was originally authorized to waive the waiting period, it was abolished by P.L. 95-110, section 1, 91 Stat. 884, and its duties were assigned to standing committees of the House and Senate See, 42 U.S.C section 5814

49. Immigration and Nationality Act Amendments, 1957 (P.L. 85-316, 8 U.S.C Section 1255b, 71 Stat. pp. 642, 643)
(One House disapproval)

50 Atomic Energy Act Amendment, 1958 (P.L. 85-568, 42 U.S.C. Section 2153, 72 Stat. pp. 276, 277)
(Two House disapproval, amended in respects other than legislative veto by P.L. 93-485, see number 168, Atomic Energy Act Amendments, 1974)

51. National Aeronautics and Space Act of 1958 (P.L. 85-568, 42 U.S.C. Section 2453, 72 Stat. Section 302, p. 433)
(Two House disapproval)

52. Defense Reorganization Act (P.L. 85-599, 10 U.S.C. Section 125, 72 Stat. Section 3, pp. 514, 515)
(One House disapproval)
It appears that this provision was superseded by P.L. 87-651, title II, section 201(a), 76 Stat. 515, Sept. 7, 1962, and amended by P.L. 89-501, title IV, section 401, 80 Stat. 278, July 13, 1966. Section 125 of title 10 is also a one House disapproval provision.

58. Public Buildings Act of 1959 (P.L. 86-249, 40 U.S.C. Section 606, 73 Stat. pp. 479-486)
(Two committee approval, section 7, amounts of projects subject to approval were amended by P.L. 92-313, see number 129, the Public Buildings Amendment of 1972)

63. Foreign Assistance Act of 1961 (P.L. 87-195, 22 U.S.C. Section 2367, 75 Stat. 444)
(Two House disapproval)

65 Government-Owned Utilities Used for Bureau of Indian Affairs, 1961 (P.L. 87-279, 25 U.S.C. Section 15, 75 Stat. 577)
(Two committee approval terminates waiting period, but no provision for either or both committees to approve or disapprove of proposed executive action)

66. Restoration to Indian Tribes of Unclaimed Payments, 1961 (P.L. 87-283, 25 U.S.C. Section 165, 75 Stat. 584)
(Two committee approval terminates waiting period, but no provision for either or both committees to approve or disapprove of proposed executive action)

70. Surveys of Watershed Areas for Flood Prevention, 1962 (P.L. 87-639, 16 U.S.C. Section 1009, 76 Stat. 438)
(One committee directs making of investigations, surveys, and reports)

72. Trade Expansion Act of 1962 (P.L. 87-794, 19 U S.C. Section 1981, 76 Stat. pp. 872, 899)
(Two House approval)

73. Naval Petroleum and Oil Shale Reserves, 1962 (P.L. 87-796, 10 U.S.C. Section 7431 76 Stat. 904-906, this provision was amended by P.L. 94-258, section 201(12), 90 Stat. 311, but the legislative veto was not changed)
(Consultation with two committees)

83 Agricultural Trade Development and Assistance Act Amendments, 1964 (P.L. 88-638, 7 U.S.C. Section 1704, 78 Stat. 1036)
(One committee disapproval)

87. Authorization of Construction, Repair and Preservation of Certain Public Works, 1966 (P.L. 89-298, 42 U.S.C. Section 1962d-5, 79 Stat. 1073, 1074, Section 201(a))
(Two committee approval)

97. Postal Revenue and Federal Salary Act of 1967 (P.L. 90-206, 2 U.S.C. Section 359, 81 Stat. 613, 644, was amended by P.L. 95-19, the Emergency Unemployment Compensation Extention Act of 1977, see page 6 of this report)
(Disapproval by one House or enactment of law)

111 National Traffic and Motor Vehicle Safety Act Amendments 1970 (P L. 91-265, 15 U.S.C Section 1431, 84 Stat. 263)
(Two House approval)

113 Defense Production Act of 1950, Amendment, 1970 (P.L. 91-379, 50 App. Section 2168, 84 Stat. 796)
(Two House disapproval)

119. Federal Pay Comparability Act of 1970 (P L. 91-565, 5 U.S.C. Section 5305, 84 Stat 1947-1949)
(One House approval)

133 Rural Development Act of 1972 (P.L. 92-419, 7 U S.C. Section 2666, 86 Stat. 674)
(Disapproval by enactment of statute)
The wording does not make clear whether this action would be taken by two Houses alone or enactment of statute, viz., "If the next Congress shall not direct such sum to be paid, ...

140. Indian Claims Judgments Funds, 1973 (P.L. 93-134, 25 U.S.C. Section 1405, 87 Stat 466, 468)
(Two committee approval and one House disapproval)

142. War Powers Resolution, 1973 (P L 93-148, 50 U.S.C. Sections 1544-1546, 87 Stat. 556-559)
(Continued use of armed forces subject to approval by enactment of law, or removed by concurrent resolution.)

143. Amendments to the Mineral Leasing Act of 1920, 1973 (P L. 93-153, 30 U.S.C. Section 185, 87 Stat. 582)
(Two House disapproval)

144. Department of Defense Authorizations, 1974 (P.L. 93-155, 50 U.S.C. Section 1431, 87 Stat. 605, 623)
(One House disapproval, section 807)

149. District of Columbia Self-Government Act, 1973 (P.L. 93-198, D.C. Code Section 1-233 (1981 edition), formerly, D.C. Code Section 1-147, 87 Stat. p. 814)
(Two House disapproval for some Council actions, one House disapproval for others)

154. Public Works, Rivers and Harbors and Flood Control Authorization, 1974 (P.L. 93-251, 33 U.S.C. Section 579, 88 Stat. pp. 16-17)
(One committee disapproval)

157. Congressional Budget and Impoundment Control Act of 1974 (P.L. 93-344, 2 U.S.C. Section 684, 88 Stat. 297-339)
(One House disapproval of deferrals, approval of rescissions by enactment of statute)

158. Department of Defense Authorizations for 1975 (P.L. 93-365, 50 App. Section 2403-1, 88 Stat. 408)
(Two House disapproval)

160 Atomic Energy Act Amendments, 1974 (P.L. 93-377, 42 U.S.C. Section 2153, 88 Stat. 474)
(Two House disapproval)

162. Education Amendments, 1974 (P.L. 93-380, 20 U.S.C. Section 1232, 88 Stat. 567)
(One committee disapproval waiver of waiting period in sections 402 and 509, and two House disapproval in section 509)

166. Conveyance of Submerged Lands to Guam, Virgin Islands and American Samoa, 1974 (P.L. 93-435, 48 U.S C. Section 1706, 88 Stat. 1211)
It is not clear whether conveyances may be ongoing or only made once. (Although no formal approval or disapproval mechanism, notification by two committees that they will take no action terminates waiting period.)

Federal Election Campaign Act Amendments of 1974 (P.L. 93-443, 2 U.S.C. Section 438, 88 Stat. 1694-1702)
(One House disapproval; After the Supreme Court in Buckley v. Valeo, 424 U.S. 1 (1976), declared unconstitutional some provisions of this act, Congress enacted the Federal Election Campaign Act Amendments of 1976, P.L. 94-283, on May 13, 1976. Section 101 (g) (3) provided that rules or regulations which had been proposed by the Federal Election Commission prior to adoption 30 days after approval of the amendments. The Act was amended by P.L. 96-187, in 1979, with respect to the period of review and procedure for consideration.)

168 Atomic Energy Act Amendments, 1974 (P.L 93-485, 42 U.S.C. Section 2153, 88 Stat 1460)
(Two House disapproval) (modified number 160, above, but retained the two House disapproval)

173. Foreign Assistance Act of 1974 (P.L. 93-559, 22 U S.C. Section 2776, 93 Stat 1815)
This provision was subsequently modified, but the legislative veto provision was not changed. See, note to 22 U.S.C. Section 2776.
(Two House disapproval, section 45)

174. Federal Nonnuclear Research and Development Act of 1974 (P.L 93-577, 42 U.S.C. Section 5911, 88 Stat. 1892, 1893)
(One House disapproval, section 12)

Federal Rules of Evidence (P.L. 93-595, 28 U.S.C Section 2076, 88 Stat. 1948)
(One House disapproval)

175. Trade Act of 1974 (P.L. 93-618)(See Appendix for citations)
(One and two House approval and disapproval, consultation with committees)

178. Export-Import Bank Amendments (P.L. 93-646, 12 U.S.C. Section 635, 88 Stat. 2333-2337)
(Two House approval)

184. Amendment to Social Security Act Child Support Provisions (P.L. 94-88, 42 U.S C. Section 655 note, 89 Stat. 433)
(One or two House disapproval)

185. Board for International Broadcasting Authorization for Fiscal Year 1976 (P.L. 94-104, 22 U.S.C. Section 2370, 89 Stat. 509, 510)
(Two House disapproval)

188. Sinai Early Warning System Agreement, 1976 (P.L. 94-110, 22 U.S.C. Section 2441nt, 89 Stat. 572-573)
(Two House disapproval)

192. International Development and Food Assistance Act of 1975 (P.L. 94-161, 7 U.S.C. Section 1711, 89 Stat. 857, 22 U.S C. Section 2151n or 2367, 89 Stat. 860, 22 U.S.C Section 2151a, 89 Stat. 856, 857, 859)
(One House disapproval, section 207, two House approval, section 310, two committee approval, sections 302 and 306)

193. Energy Policy and Conservation Act (P.L. 94-163, 42 U.S.C. Section 6421, 6422, 89 Stat. 871-969)
(One House disapproval, but two House approval terminates waiting period, section 551, and two House approval, section 552)

196. Home Mortgage Disclosure Act of 1975 (P.L. 94-200, 12 U.S.C Section 461nt, 89 Stat. 1124)
(Two House approval)

1976-1977

Source: "1976-1977 Congressional Acts Authorizing Prior Review, Approval or Disapproval of Proposed Executive Actions," Congressional Research Service Report No. 78-117 GOV (May 25, 1978), by Clark F. Norton

Approval or Disapproval by Either or Both Houses

Naval Petroleum Reserves Production Act, 1976 (P.L. 94-258, 10 U.S.C. Section 7422, 90 Stat. 307)
(One House disapproval, section 201)

Fishery Conservation and Management Act of 1976 (P.L. 94-265, 16 U.S.C. Section 1823, 90 Stat. 340)
(Disapproval by enactment of statute, section 203)

International Security Assistance and Arms Export Control Act of 1976 (P.L. 94-329, 22 U.S.C. Sections 2776, 2755, 2371, 2753, 2314, 2429, 90 Stat. 743, 752, 753-756)
(Two House disapproval, section 211)

National Emergencies Act, 1976 (P.L. 94-412, 50 U.S.C. Section 1622, 90 Stat. 1255)
(Two House approval, section 202)

Federal Land Policy and Management Act of 1976 (P.L. 94-579, 43 U.S.C. Section 1715, 90 Stat. 2751)
(Two House disapproval, sections 204(c))

Emergency Unemployment Compensation Extension Act of 1977 (P L. 95-19, 2 U.S.C. Section 359, 91 Stat. 45)
This provision which requires a record vote on salary increases for Members may have been affected by section 130(c) of P.L 97-51, 95 Stat. 966, the Continuing Appropriations for FY 1982. This section, codified at U S C. Section 31 note, appears to appropriate cost of living adjustments to Members beginning in 1983.
(Two House approval)

Export Administration Amendments of 1977 (P L 95-52, 50 App. Section 2406(g), 88 Stat 408)
This act expired on Sept 30, 1979, but its veto provision was continued, with some modifications by P L 96-72, 93 Stat 520, a two year authorization that expired on September 30, 1981 Extensions, H.R. 3567 and S 1112, are currently pending.
(Two House disapproval, section 106, this act was amended with respect to scope of coverage by P.L 96-72, sections 8(d)(2)(B) and 7(g)(3) in 1979)

International Navigational Rules Act of 1977 (P.L. 95-75, 16 U.S.C. Section 1602, 91 Stat. 308)
(Two House disapproval, section 3(d))

International Security Assistance Act of 1977 (P.L. 95-92, 22 U.S.C. Section 2753, 91 Stat. 622)
(Two House disapproval, section 16, this act was amended with respect to scope of coverage by P.L. 95-384, in 1978 and P L. 96-92, in 1979)

Wartime or National Emergency Presidential Powers, 1977 (P.L. 95-223, 50 U.S.C. Section 1706, 91 Stat. 1628)
(Two House disapproval)

1978

Source "1978 Congressional Acts Authorizing Congressional Approval or Disapproval of Proposed Executive Actions," Congressional Research Service Report No. 79-46 GOV (February 12, 1979), by Clark F. Norton

Approval or Disapproval by Either or Both Houses

Department of Energy Act of 1978--Civilian Application (P.L. 95-238, 22 U.S.C. Section 3224a, 42 U.S.C. Section 5919, 92 Stat. 55)
(One House disapproval, section 107, approval by two Houses or enactment of statute, section 207(b))

Nuclear Non-Proliferation Act of 1978 (P.L. 95-242, 42 U.S.C. Sections 2160, 2155, 2157, 2153, 92 Stat. 120)
(Two House disapproval, sections 303(a), 304(a), 306(a), 307, and 401)

Outer Continental Shelf Lands Act Amendments of 1978 (P L. 95-372, 43 U.S.C. Sections 1337, 1354, 92 Stat. 629)
(One House disapproval, section 205(a), two House disapproval, section 208)

Civil Service Reform Act of 1978 (P L 95-454, 5 U S.C Section 3131nt, 92 Stat. 1111)
(Two House disapproval which may be exercised in the fifth year after promulgation of regulations)

Airline Deregulation Act of 1978 (P.L. 95-504, 49 U.S.C. Sections 1552, 1341nt, 92 Stat. 1693)
(One House disapproval, section 43(f)(3), two House approval, section 45)

Full Employment and Balanced Growth Act of 1978 (P.L. 95-523, 31 U.S.C. Section 1322, 92 Stat. 1887)
(Two House modification of statutory date for achievement of reducing unemployment, section 304(b))

Education Amendments of 1978 (P.L. 95-561, 25 U.S.C. Section 2018, 20 U.S.C. Sections 1221-3, 927, 92 Stat. 2327, 2341, 2369)
(Two House disapproval extended to regulations relating to various matters, sections 1138, 1212, and 1409)

Surface Transportation Assistance Act of 1978 (P.L. 95-599, 23 U.S.C. Section 103nt, 92 Stat. 2689)
(Two House approval, section 144)

Natural Gas Policy Act of 1978 (P.L. 95-621, 15 U.S.C. Sections 3332, 3342, and 3346, 92 Stat. 3351)
(Two House disapproval and approval between 1985 and 1987, sections 122(c)(1) and 122(c)(2), one House disapproval, section 206(d) (2))

Approval or Disapproval by Committees of Either or Both Houses

Emergency Interim Consumer Product Safety Standard Act of 1978 (P.L. 95-319, 15 U.S.C. Section 2082, 92 Stat. 386)
(Two committee approval, section 3(a))
The period for this review may have expired.

1979, 1980

Source "Congressional Veto Provisions and Amendments: 96th Congress," Congressional Research Service, Issue Brief No. 79044 (updated to March 2, 1981), by Clark F. Norton

Numbers in the margin of this report correspond to page numbers in the issue brief.

Approval or Disapproval by Either or Both Houses

20 Federal Trade Commission Improvements Act of 1980 (P.L. 96-252, 15 U S.C. Section 57a-1, 94 Stat 393)
(Two House disapproval, section 21)

22 Department of Education Organization Act, 1979 (P.L. 96-88, 20 U S.C. Section 3474, 93 Stat. 685)
(Two House disapproval, section 414(b))

27. Export Administration Act of 1979 (P.L. 96-72, 50 U.S.C. App. Section 2406, 93 Stat. 518, 519)
(Two House approval and disapproval, section 7)

30 Energy Security Act (P L 96-294, 93 Stat. 891) (See Appendix for citations)
(21 separate legislative veto provisions, including one House disapproval, one House disapproval but approval by both Houses terminates review period, approval by joint resolution, two House approval, waiver of congressional review period by agreement of committee chairman and ranking minority members)

37. District of Columbia Retirement Reform Act, 1979 (P.L. 96-122, D.C. Code Section 1-734 (1981 edition), 93 Stat. 891)
(One House disapproval, section 164)

38. Multiemployer Pension Plan Amendments Act, 1980 (P L. 96-364, 29 U.S.C. Section 1322, 94 Stat 1213)
(Two House disapproval, section 102)

43. Marine Protection Research and Sanctuaries Act Authorization, 1980 (P L. 96-332, 16 U.S.C. Section 1432, 94 Stat 1057)

(Two House disapproval, section 2)

49. Farm Credit Act Amendments of 1980 (P.L. 96-592, 12 U.S.C. Section 2251, 94 Stat. 3449)
(Two House disapproval, section 508)

49. Comprehensive Environmental Emergency Response, Compensation, and Liability Act, 1980 (P.L. 96-510, 42 U.S.C. Section 9655, 94 Stat. 2809)
(Two House disapproval or one House disapproval that is not disapproved by the other House, section 305)

54. Veterans' Rehabilitation and Education Amendments of 1980 (P.L. 96-466)
(Approval by Director of the Office of Technology Assessment)

55. National Historic Preservation Act Amendments of 1980 (P.L. 96-515, 16 U.S.C. Section 470w-6, 94 Stat. 3004)
(Two House disapproval, section 501)

63. International Security Development Cooperation Act of 1980 (P.L. 96-533, 22 U.S.C. Sections 2776, 2346a, 94 Stat. 3134, 3136, and 3142)
(Two House disapproval, sections 105(d)(1), 107(b)(5) and 202)

65. Coastal Management Improvement Act of 1979 (P.L. 96-464, 18 U.S.C. Section 1463a, 94 Stat. 2067)
(Two House disapproval, section 12)

66. Federal Insecticide, Fungicide and Rodenticide Extension Act, 1980 (P.L. 96-539, 7 U.S.C. Section 136w, 94 Stat. 3195)
(Two House disapproval, section 4)

Approval or Disapproval by Committees of Either or Both Houses

24. Health Planning Amendments of 1979 (P.L. 96-79, 42 U.S.C. Section 300n nt, 93 Stat. 628)
(Consultation with two committees, section 126(a)(2))

1981, 1982

Source. "Congressional Veto Legislation. 97th Congress," Congressional Research Service Issue Brief No. 81138 by M. Suzanne Cavanaugh, Rogelio Garcia, and Clark F. Norton.

Numbers in the margin of this report correspond to the pages of the issue brief.

10. Omnibus Reconciliation Act of 1981 (P L. 97-35)(See Appendix for citations)
(One House disapproval of regulations relating to student loan eligibility, title V, section 532(a), rules relating to Department of Transportation programs most effective in reducing accidents, injuries, and deaths, title XI, section 1107(d), freight transfer agreements, title XI, section 1142, and amendments to the Route Service Criteria authorized by the Rail Passenger Act, title XI, section 1183(a) (2).)

16 (Two committee approval, Section 516(d)(1)(B), relating to waiver of authorization of the Higher Education Act of 1965, 20 U.S.C. Section 1070a nt, 95 Stat. 447)

18 (Disapproval by two Houses or disapproval by one House that is not rejected by the other House, Section 1207, relating to regulations promulgated by the Consumer Product Safety Commission, 15 U.S.C. Sections 2083, 1276, and 1204, 95 Stat. 718-720)

Congressional Veto Legislation in the 97th Congress (Beginning August 1981)

Department of Defense Authorization Act, 1982. Pub. L. No. 97-86. Section 911 (1981). 10 U.S.C. 2382(b)(Two House concurrent resolution disapproval of Presidential emergency regulations controlling excessive profits on defense contracts).

Agriculture and Food Act of 1981. Pub. L. No. 97-98. Title XV, §1523, 16 U.S C. §3443 (The Senate Committee on Agriculture, Nutrition and Forestry and the House Agriculture Committee must approve by resolution plans under the reservoir sedimentation reduction program).

Appropriations -- Department of the Interior -- Fiscal Year. Pub. L. No. 97-100. 95 Stat. 1391, 1407 (1981). (Title II--Related Agencies. Department of Agriculture. Administrative Provisions, Forest Service) ("The appropriation structure for the Forest Service may not be altered without advance approval of the House and Senate Committees on Appropriations.")

International Security and Development Cooperation Act of 1981. Pub. L. No. 97-113. 95 Stat. 1519, 1520. (Title I, §102(a)(2), 22 U.S.C. §2753(d)(2)(B)) (Concurrent resolution of disapproval for proposed transfer under the Arms Export Control Act of NATO countries, Japan, Australia or New Zealand that are subject to emergency certification).

International Security and Development Cooperation Act of 1981. Pub. L. No. 97-113. 95 Stat. 1519, 1525 (1981). (Title I, §109(a), 22 U.S.C. §279b(a)(1)) (Concurrent resolution of disapproval for certain military equipment transfers and loans under ch. 2 of part II of the Foreign Assistance Act of 1961).

International Security and Development Cooperation Act of 1981. Pub. L. No. 97-113. 95 Stat. 1519, 1562 (1981). (Title VII, §737(b), 22 U.S.C. §2429(b)(2)) (Concurrent resolution of disapproval suspending nuclear enrichment transfers to foreign nations).

International Security and Development Cooperation Act of 1981. Pub. L. No. 97-113. 95 Stat. 1519, 1562 (1981). (Title VII, §737(c), 22 U.S.C. §2429a) (Concurrent resolution of disapproval for delivery of nuclear reprocessing equipment, materials or technology to foreign nations).

Urgent Supplemental Appropriations Act, 1982 Pub. L. No. 97-216. (Title I, Chap. IV, 96 Stat. 180, 189 (1982) ("That no reorganization of the Bureau of Alcohol, Tobacco and Firearms or the transfer of the Bureau's functions, missions, or activities to other agencies within the Department of the Treasury subsequent to September 30, 1982, shall be accomplished or implemented without specific, express approval of both the House and Senate Committees on Appropriations.")

Department of Housing and Urban Development -- Independent Agencies Appropriation Act, 1983. Pub. L. No. 97-272. (Title II (Neighborhood Reinvestment Corporation) 96 Stat. 1160, 1172 (1982)) (With the concurrence of the Committees on Appropriations, the Secretary of HUD and the heads of various financial agencies may provide the Neighborhood Reinvestment Corp. with funds, services and facilities in order to implement the Neighborhood Reinvestment Corporation Act.)

Department of Housing and Urban Development — Independent Agency Appropriation Act, 1983. Pub. L. No. 97-272. (Title IV, §409, 96 Stat. 1160, 1179 (1982)) ("No part of any appropriations contained in this Act for personnel compensation and benefits shall be available for other object classifications set forth in the budget estimates submitted for the appropriations without the approval of the Committees on Appropriations.")

Continuing Appropriations, Fiscal Year 1983. Pub. L. No. 97-276. (Section 101(g), 96 Stat. 1186, 1190 (1982) (Without prior approval of the Committees on Appropriations, no new projects or activities may be initiated for which appropriations, funds or other authority were not available during fiscal year 1982 in connection with activities provided for in the Energy and Water Development Act, 1982).

Further Continuing Appropriations, 1983. Pub. L. No. 97-377. (Title V (Research, Development, Test, and Evaluation, Air Force), 96 Stat. 1830, 1846 (1982)) (None of the funds appropriated and available until September 30, 1984 "may be obligated or expended to initiate full scale engineering development of a basing mode for the MX missile, until such basing mode is approved by both Houses of Congress in a concurrent resolution...")

Further Continuing Appropriations, 1983. Pub. L. No. 97-377. (Title V (Research, Development, Test, and Evaluation, Air Force), 96 Stat. 1830, 1848 (1982)) (No funds may be expended for testing the MX missile until both Houses by concurrent resolution approve funds for full-scale engineering development of a basing mode).

Further Continuing Appropriations, 1983. Pub. L. No. 97-377. (Title VII) (Minority Business Development AGency). 96 Stat. 1830, 1868 (1982) (Requiring Appropriations Committees approval of "the performance of [any] program, project, or activity as a central service in accordance with the policies of said Committees applicable to reprogramming of funds" before reimbursement for, or initiation of, activities conducted with respect to 15 U.S.C. §1521 is permitted).

Department of the Interior and Related Agencies Appropriation Act, 1983. Pub. L. No. 97-394. 96 Stat. 1966, 1985 (Title II — Related Agencies. Department of Agriculture: Forest Service: Administrative Provisions) ("The appropriation structure for the Forest Service may not be altered without advance approval of the House and Senate Committees on Appropriations".)

Department of the Interior and Related Agencies Appropriation Act, 1983. Pub. L. No. 97-394. 96 Stat. 1966, 1985 (Title II -- Related Agencies. Department of Agriculture. Forest Service: Administrative Provisions) ("Provisions of section 702(b) of the Department of Agriculture Organic Act of 1944 (7 U.S.C. 2257) shall apply to appropriations available to the Forest Service only to the extent that the proposed transfer is approved by the House and Senate Committees on Appropriations in compliance with the reprogramming procedures contained in House Report 97-942.)

Department of the Interior and Related Agencies Appropriation Act, 1983. Pub. L. No. 97-394. 96 Stat. 1966, 1998 (Title III, §310) ("No assessments may be levied against any program, budget activity, subactivity, or project funded by this Act unless such assessments and the basis therefore are presented to the Committees on Appropriations and are approved by such committees.")

Department of the Interior and Related Agencies Appropriation Act, 1983. Pub. L. No. 97-394. 96 Stat. 1966, 1998 (Title III, §312) ("Funds provided for land acquisition in this Act may not be used to acquire lands for more than the approved appraised value (as addressed in section 301(c) of Public Law 91-646) except for condemnations and declarations of taking, without the written approval of the Committees on Appropriations.")

Nuclear Waste Policy Act of 1982. Pub. L. No. 97-425. 96 Stat. 2201, 2258 (1982)) (Title III, §302(a)(4) (Either House by resolution may disapprove of the Secretary of Energy's fee schedule for nuclear waste disposal funding).

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APPENDIX II

Legislative Histories of the War Powers Resolution
and The Impoundment Control Act

During the 1970's, the President and Congress resolved a series of major constitutional disputes over claims of the President to broad impoundment, war, and national emergency powers. Although each dispute and its resolution evolved separately, all arose from a single dilemma: the President's claim that broad powers were needed to deal with modern problems of budget control and foreign affairs, coupled with the recognition that broad powers must be checked. These confrontations tested the ability of the elective branches to adapt to modern problems within the limits of the Constitution. In seeking to reconcile broad power with accountability, Congress and the Executive turned to legislative review, with its history of acceptance by both branches as a solution to similar problems.

The most serious of these constitutional disputes over the reach of the President's power concerned war powers in the wake of the conflict in Vietnam. In 1964, Congress enacted the Tonkin Gulf Resolution authorizing action in Vietnam subject to termination by concurrent resolution.[1/] After the Tonkin Gulf Resolution was repealed in 1970, the President claimed inherent authority to continue hostilities, and subsequently he extended military operations to Cambodia and Laos.[2/]

1/ The resolution provided that its authority "shall expire when the President shall determine that the peace and security of the area is reasonably assured . . . except that it may be terminated earlier by concurrent resolution of the Congress." Section 3 of H.R.J. Res. 1145, 88th Cong., 2d Sess., Pub. L. No. 88-408, 78 Stat. 384, 385 (1964).

2/ See House Comm. on Foreign Affairs, 97th Cong., 1st Sess., The War Powers Resolution 26-30, 70-71, 106-10 (Comm. Print 1982) ("War Powers Resolution") (describing Presidential justifications for, and Congressional reactions to, 1970 Cambodia and 1971 Laos incursions, and 1973 Cambodia bombing).

Responding to these developments, in the early 1970's Congress deliberated extensively on legislation to govern the exercise of war powers. Congress considered in depth the constitutional issues involved in such legislation.[3/] A provision of the key House bill authorized termination by concurrent resolution of use of armed forces in hostilities, its constitutionality was challenged as violating the Presentation Clause and defended as following the precedents of the Reorganization Act and the Tonkin Gulf Resolution.[4/]

Subsequently, the constitutional issues were debated on the House floor, and were addressed in memoranda submitted by the House and Senate conferees on their respective chambers' bills.[5/] The Constitution provides that "The Congress shall have Power . . . to declare War," Art. I, Sec. 8, cl. 11; it also provides that "The President shall be Commander in Chief of the Army and Navy of the United States. . . ." Art. II, Sec. 2, cl. 1. During the consideration of war powers legislation, Administration spokesmen had emphasized the necessity for Presidents to be able to react immediately to international emergencies by use of armed forces without awaiting a declaration

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3/ For descriptions of the House and Senate hearings on war powers, see War Powers Resolution, supra note 57, at 55-61 (1970 House hearings), 72-77 (1971 Senate hearings), 93-95 (1971 House Hearings), 119-21 (1973 House Hearings), and 133-34 (1973 Senate Hearings). For description of the legislative debate on war powers legislation see id. at 43-166.

4/ War Powers Resolution, supra note 57, at 123.

5/ War Powers Resolution, supra note 57, at 144-45. The House conferees' memorandum had been published during the House debates on passage of the House bill. See 119 Cong. Rec. 21223-25 (1973).

of war; they cited the history of Presidential commitments of armed forces without express legislative authority.[6/] Supporters of war powers legislation sought means to implement the constitutional responsibility for the Congress to "declare war" before the nation committed itself to prolonged combat, while not precluding emergency Presidential commitments of armed forces in appropriate circumstances. They focused on two mechanisms for insuring legislative decisions after an emergency commitment: an automatic end to such a commitment after a fixed period of time absent express legislative authorization to continue, and a provision for termination by concurrent resolution.[7/]

6/ War Powers Resolution, supra note 57, at 58, 74, 84-85, 113, 119-20;

7/ The House bill, H.R.J. Res. 542, 93d Cong., 1st Sess., relied on a limit of 120 days after which continued commitment of armed forces would require congressional approval. It also provided for termination of commitment of armed forces at any time by concurrent resolution. The Senate bill, S. 440, 93d Cong., 1st Sess., imposed a limit of thirty days for commitment of armed forces without Congressional approval, but permitted the President unspecified additional time to remove such forces safely from hostilities. It did not provide for termination by concurrent resolution, but specified in some detail the circumstances when the President could commit armed forces. War Powers Resolution, supra note 2, at 142.

As a compromise, the War Powers Resolution provided a statement of the "constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances," section 2(c), 50 U.S.C. 1541(c). However, subsequent sections of the resolution, in which provisions for limiting and terminating commitment of armed forces were set forth, were not made dependent on the authority for the initial commitment. H.R. Rep. No. 547, 93d Cong., 1st Sess. 1-2 (1973). Automatic termination of hostilities in the absence of congressional authorization was to occur after sixty days, with an additional thirty days if the President found "unavoidable military necessity respecting the safety" of the armed forces. Section 5(b), 50 U.S.C. 1544(b). The compromise was completed by a provision for termination by concurrent resolution. Section 5(c), 50 U.S.C. 1544(c).

Regarding such termination, the House conferees' memorandum relied on an opinion submitted by Professor Paul Freund, whose "conclusion [was] that, on the substantive premises of the bill, the provision respecting a concurrent resolution is a valid and appropriate measure, and does not raise constitutional issues of the kind mooted in connection with other categories of legislation." 8/ The House provision thus justified was enacted by Congress as section 5(c) of the War Powers Resolution, 50 U.S.C. 1544(c), which provides:

> Notwithstanding subsection (b) of this section, at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

After the House and Senate adopted the conference version of the War Powers Resolution, President Nixon vetoed it. The President's veto message contended that two provisions were unconstitutional: the provision that "would automatically cut off certain authorities [to commit armed forces to hostilities] after sixty days," and the provision that "would allow the Congress to eliminate certain authorities merely by the passage of a concurrent resolution—an action which does not normally have the force of law, since it denies the President his constitutional role in approving legislation." 9/ President Nixon's veto message was the first time since adoption of the Reorganization Act of 1939 that any President had formally disputed the constitutionality of a legislative review provision other

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8/ 119 Cong. Rec. 21224-25 (1973) (reprinting letter of June 12, 1973, from Paul A. Freund to Rep. Pierre S. du Pont).

9/ 9 Weekly Comp. Pres. Doc. 1285-87 (1973).

than a provision for committee review. The House and Senate passed the War Powers Resolution over the President's veto, the only time a legislative review provision has ever been enacted over a Presidential challenge to its constitutionality.[10/]

The following year, Congress resolved the problem posed by Presidential claims of inherent power to impound appropriations by a similar measure. In the early 1970's, President Nixon impounded appropriated funds totalling over eighteen billion dollars.[11/] In response, Congress held hearings on legislation to govern impoundment,[12/] and enacted such legislation as part of a general reform of the Congressional budget process. In 1973 and 1974, the Senate passed two bills, the first providing that impoundments could become effective only if both Houses approved, the second forbidding all impoundments.[13/]

10/ President Carter later took a different view of the War Powers Resolution, endorsing it as a "constructive safeguar[d]". President's Message to the Congress on Legislative Vetoes, Pub. Papers 1146, 1149 (1978).

11/ See 119 Cong. Rec. 8295-96 (1973).

12/ Joint Hearings on Impoundment of Appropriated Funds by the President Before the Ad Hoc Subcomm. on Impoundment of Funds of the Senate Comm. on Government Operations and the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. (1973), Hearings on Executive Impoundment of Appropriated Funds Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess. (1971).

13/ S. 373, 93d Cong., 1st Sess., adopted by the Senate, 119 Cong. Rec. 15255 (1973), allowed the President to impound appropriations for sixty days, at which point the impoundment would cease unless Congress adopted a concurrent resolution of approval. The Senate adopted H.R. 7130, 93d Cong., 2d Sess., after substituting, in place of the House language, the language of S. 1541, 93d Cong., 2d Sess., which prohibited impoundments. 120 Cong. Rec. 7938 (1974).

The House adopted a provision allowing impoundments with the proviso that either House could disapprove them.[14/] Critics challenged the constitutionality of the House provision, while its supporters defended it as following the Reorganization Act.[15/]

In conference, a compromise was achieved under which permanent impoundments, termed "rescissions", would require approval by Congress within 45 days through enactment of legislation. In contrast, temporary impoundments, or "deferrals", would become effective unless disapproved by one House. This compromise was seen as providing the President with flexibility, while preserving the constitutional balance. The decision to permanently rescind funds was not delegated to the President, as that was seen as allowing him to undo previously enacted decisions on appropriations, a power of "suspension" of legislation denied him by the Framers.[16/] Allowing the President to defer expenditures, subject to legislative review, arguably preserved and aided

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14/ H.R. 7130, 93d Cong., 1st Sess., adopted by the House, 119 Cong. Rec. 39740 (1973).

15/ Compare H.R. Rep. No. 658, 93d Cong., 1st Sess. 42 (1973) (finding "sufficient precedent" in the Reorganization Act) with id. at 87 (minority views) deeming a one-House disapproval resolution to "be of doubtful legal effect"). As the floor manager of the House bill, Representative Bolling, explained, "The formula [of Presidential proposal of impoundments subject to disapproval by either House] has been used for a quarter of a century to enable the President to propose, and Congress to review, plans to reorganize Federal agencies." 119 Cong. Rec. 25546 (1973).

16/ A proposal in the Constitutional Convention "that the national executive have a power to suspend any legislative act for the term of ----" was rejected, after Elbridge Gerry observed "that the power of suspending might do all the mischief dreaded from the negative of useful laws, without answering the salutary purpose of checking unjust or unwise ones." 5 J. Elliott, supra note 9, at 154-55. See Department of Justice Authorization and Oversight, 1981. Hearings Before the Senate Comm. on the Judiciary, 96th Cong., 2d Sess. 885-94 (1981) (discussing case law and historical underpinnings for lack of Presidential authority to suspend legislation).

the legislative process, since it provided time for a legislative decision on whether to change previous decisions on appropriations. These provisions were enacted with the President's approval.

The Impoundment Control Act's provision for legislative review has been used extensively. Presidents have submitted some two hundred proposed budget deferrals, of which sixty-five have been disapproved by resolutions of the House or Senate with no protest by the Executive. President Carter, in his message on legislative vetoes, termed the budget act, like the War Powers Resolution, a "constructive safeguar[d]," and the House Rules Committee, which has opposed other kinds of legislative review provisions, deemed the War Powers Resolution and the impoundment control provisions "compelling examples [of] histories of essentiality". 17/

These statutes were followed by others addressing similar problems. the National Emergencies Act, treating potential problems with accumulated Executive emergency power, 18/ the Arms Export Control Act, addressing the

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17/ President's Message to the Congress on Legislative Vetoes, Pub. Papers 1146, 1149 (1978), H.R. Rep. No. 809, 97th Cong., 1st Sess., pt. 2 at 18 (1982).

18/ Pub. L. No. 94-412, 90 Stat. 1255 (1976). Section 202, 50 U.S.C. 1622, provides for termination of national emergencies by concurrent resolution. See Note, The National Emergency Dilemma. Balancing the Executive's Crisis Powers with the Need for Accountability, 52 S. Cal. L. Rev. 1453 (1979), A. Schlesinger, The Imperial Presidency 306-10 (1974), note 80 infra (Senate hearings and reports).

International emergencies can also be terminated by concurrent resolution. Act of December 8, 1977, Pub L. No. 95-223, Section 207(b), 91 Stat. 1625, 1628, 50 U.S.C. 1706(b) (Supp. IV 1980) (concurrent resolution under National Emergencies Act can specify termination of Presidential authority in international emergencies). This Court has recently examined the background of an international emergency in which the President used the authority delegated by this statute. Dames & Moore, Inc. v. Regan, 453 U.S. 654 (1981).

problem of foreign arms sales,[19] and the Nuclear Non-Proliferation Act of 1978, treating the problem of exports of nuclear capability.[20] Under these provisions, major congressional deliberations over foreign policy have occurred, such as in consideration of President Reagan's 1981 plans to sell sophisticated aircraft to Saudi Arabia.[21]

19/ Pub. L. No. 94-329, 90 Stat. 729 (1976). Section 211, 22 U.S.C. 2776(b), provides for disapprovals of sales of major defense equipment by concurrent resolution. See Morrison, The Arms Export Control Act: An Evaluation of the Role of Congress in Policing Arms Sales, 14 Stan. J. Int'l Studies 105 (1979).

20/ Pub. L. No. 95-242, Sections 303, 304(a), 306, 307, and 401, 92 Stat. 120, 130, 137, 139, 144-45, 42 U.S.C. 2160(f), 2155(b), 2157(b), 2158, and 2153(d) (Supp. IV 1980), provide for disapproval of various international nuclear arrangements by concurrent resolution.

21/ See H.R. Rep. No. 268, 97th Cong., 1st Sess. (1981), S. Rep. No. 249, 97th Cong., 1st Sess. (1981), 127 Cong. Rec. H7236-7308 (daily ed. Oct. 14, 1982), id. at S12237-12452 (daily ed. Oct. 28, 1981).

APPENDIX 4

REVIEW OF TESTIMONY OF STANLEY BRAND, GENERAL COUNSEL, CLERK OF THE HOUSE OF REPRESENTATIVES, BY RAYMOND J. CELADA, SENIOR SPECIALIST IN AMERICAN PUBLIC LAW, AMERICAN LAW DIVISION, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS

The House Committee on Foreign Affairs on Tuesday, July 19, 1983, began the public phase of its inquiry into the impact of recent Supreme Court actions invalidating one- and two-House legislative vetoes with the testimony of Stanley Brand. The legislative veto is the device increasingly relied on by Congress in the last dozen or so years to control Executive Branch and agency action by means short of law. Mr. Brand, General Counsel to the Clerk of the House, represented the body at all stages of the proceedings in these cases.

The hearing was called to order by House Foreign Affairs Committee Chairman Clement J. Zablocki who summarized the decision in the landmark legislative veto case and some of its apparent short and long term consequences. Based on his many years of experience, the Chairman said that Justice White, one of two dissenters in INS v. Chadha, accurately described the veto mechanism when he said that it was not a means employed by Congress "to aggrandize itself at the expense of the other branches," but "a means of defense, a reservation of ultimate authority necessary ... to fulfill its designated role ... as the nation's lawmaker."

The task at hand, the Chairman declared, was to assess the ramifications of the decision on matters of direct and immediate concern to the committee. He pointed out that the list of veto provisions that followed Justice White's dissenting opinion included sixteen laws impacting on foreign affairs and national security, among them the landmark War Powers Resolution. For this reason together with recent Rules Committee action denying a rule on the foreign aid bill because it contained a veto, Chairman Zablocki said that

the purpose of the hearings was to clarify the precise meaning and implications of the decision in order to address the question how best to deal -- harmoniously and practically -- with the existing situation.

Mr. Brand's general assessment of the legal landscape after Chadha was conspicuous for its lack of optimism regarding the future utility of the veto. Noting that the Chairman had been one of the principal architects in development and passage of the War Powers Resolution, he expressed the hope that he would not wear out his welcome "after what I have to say today."

Reading from a prepared statement, Mr. Brand observed that the immediate effect of the Chadha decision was to invalidate only the provision of the Immigration and Nationality Act that allowed Congress to overturn administrative suspension of deportation on hardship grounds. However, because of the Court's reasoning in that case and its subsequent summary affirmance of the D.C. Circuit ruling striking down the two-House veto of the Federal Trade Commission's proposed used car rule, he held out little hope for most if not all legislative vetoes, including those of immediate concern to the committee. "[T]he Chadha decision is a broad sweeping pronouncement by the Court which fairly read places the concurrent resolution veto provisions in statutes like the Nuclear Non-Proliferation Act, ... the International Security Assistance and the Arms Control Act of 1976, ... and the War Powers Resolution ... in dire jeopardy, if not in extremis, along with many other legislative review mechanisms."

Mr. Brand pointed out that Chadha indicates that congressional reversal of administrative decisionmaking pursuant to statutorily delegated authority

requires action in conformity with the Constitution's prescription for legislative action· joint action by the House and Senate (bicameralism) and submission to the President (presentment). In brief, when Congress undertakes to alter the legal rights, duties and relations of persons outside the legislative arena, whether private citizens or Executive Branch officials, it has to pass a law to that effect. Accordingly, it was his view that it was irrelevant constitutionally whether the veto is exercised in a simple or concurrent resolution since neither complies with the presentation requirement.

Mr. Brand next turned to the second and "only remaining issue" raised by all existing legislative veto provisions, namely, the effect of their invalidity on the act or the section of the act of which they are a part. This issue, termed "severability", turns on the presence of an express severability clause in the act ("providing that the remainder of the act shall not be affected by the invalidity of a part"), support in the legislative history for or against severability, and whether after severance the remaining part is "'fully operative as a law'" and constitutes "'a workable administrative mechanism without the one-House veto.'" Briefly, the presence of a severability clause raises a presumption that the part of an act that delegates authority can and should survive the removal of the allied legislative veto check unless rebutted by the intent of the lawmakers as gleaned from legislative history. Although the issue can only be resolved on a case-by-case basis, Mr. Brand suggested that court handling of the issue to date indicates a judicial inclination in favor of severability.

For this reason, together with the action taken by the Rules Committee on the foreign aid bill and the possibility that the Executive Branch officials might be tempted to act independently of Congress after the decision,

Mr. Brand advised the committee to examine those laws within its jurisdiction that contain legislative vetoes with a view to replacing them with constitutionally acceptable alternatives. He observed that even if the administration was disposed toward cooperations rather than confrontation, third parties, such as an arms concern adversely affected by a veto, could challenge the Arms Export Control Act in the courts.

Mr. Brand generally described legally acceptable alternatives -- most of which entail the enactment of law -- as including the refusal to delegate authority, writing delegations with greater specificity and precision, subjecting proposed exercises of delegated authority to report and wait requirements prior to their becoming effective, placing other legal restrictions or conditions on the exercise of delegated authority, and using the congressional power over the purse toward a similar end. The only suggested non statutory option available to Congress was the conduct of vigorous and effective oversight.

All of these substitutes for the ill-fated legislative veto have serious shortcomings according to Mr. Brand. For example, the imposition of conditions or limitations on the expenditure of appropriated funds, "skews" the process in favor of the Appropriations Committees and away from the policy committees. Writing laws with greater specificity and precision, he maintained, is frequently easier said than done and could hamstring the political process which occasionally requires purposeful vagueness at the expense of unassailable clarity to reach a compromise. The conduct of congressional oversight of all or even a substantial amount of administration would overwhelm the Congress to the detriment of its legislative function. As a consequence, he stated "that Congress [would be] better served by wholesale repeal of the delegations

effected (sic) by these [veto] statutes and a return ... 'to the way we were.'" " ... let the Executive now utilize the procedures it argued were essential and unbending to preclude legislative tyranny to obtain needed authority on a case-by-case basis. The Executive cannot now be heard to complain that subjecting its authority to bicameral review and presentment threatens the workability of our government. Congress should shift the burden to the Executive to convince the Congress on a case-by-case basis that it needs unreviewable authority."

During the question and answer period that followed his formal presentation, Mr. Brand repeated his reading of Chadha and its adverse implications for disapproval resolutions applicable to arms sales, to the involvement of the U.S. armed forces in foreign hostilities, and to aborting declared states of national emergencies.

The Chairman and Committee Members questioned the feasibility of wholesale repeal of statutory delegations. There seemed to be a general feeling that a response of this nature did not address the practical aspects of the problem: Congress could not review every action and the resulting workload would be enormous. One Member speculated whether the President would go along with such statutory repealers. Mr. Brand responded with an alternative suggestion· individual review of each statutory delegation of authority in order to make a determination of the proper congressional response. But he urged that the review be conducted on a priority basis with such significant enactments as the War Powers Resolution given primacy.

In this context and in response to a question, Mr. Brand felt that the courts likely would not distinguish between an exercise of the war powers and

the power over immigration since both were plenary congressional powers. Moreover the Constitution granted the President some independent war powers, a consideration not a factor in the immigration area.

Mr. Brand indicated that a joint resolution of approval or disapproval as a substitute for a two-House veto would pass constitutional muster. Clearly, however, this option would place a "heavy burden" on Congress both in terms of time and effort.

He likewise felt that the courts would strain to sustain the remainder of an act and that it would require compelling legislative history to make a strong case for nonseverability.

The general thrust of Mr. Brand's testimony appeared to be that Congress can control the administration of the laws but only if it did so in conformity with constitutional requirements of bicameral action and presentment to the President. It was unmistakeable that for various reasons he did not believe that the lawmaking route was the functional equivalent of the now apparently doomed one- and two-House vetoes.

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APPENDIX 5

REVIEW OF TESTIMONY OF EDWARD C. SCHMULTS, DEPUTY ATTORNEY GENERAL, AND KENNETH W. DAM, DEPUTY SECRETARY OF STATE, BEFORE THE HOUSE COMMITTEE ON FOREIGN AFFAIRS

The House Foreign Affairs Committee on July 20, 1983 conducted its second day of public hearings into the impact of judicial actions invalidating one- and two-House legislative vetoes with Administration representatives from the Departments of Justice and State, Edward C. Schmults and Kenneth W. Dam. The legislative veto, the device increasingly relied on by Congress in recent years to control Executive Branch and agency actions, figures prominently in laws of direct and immediate concern to the Committee. Among the laws implicated by recent judicial developments are such landmark enactments as the War Powers Resolution, the Arms Export Control Act, the Nuclear Non-Proliferation Act, and the Jackson-Vanik Amendment and other trade-related issues arising under the Trade Reform Act of 1974.

Chairman Clement J. Zablocki opened the hearing by restating that the purpose of the inquiry was to clarify the precise meaning and implications of the Court's June 23, 1983 Chadha decision and July 6, 1983 actions in order to deal effectively and cooperatively with the new legal order brought on by these developments. He particularly looked forward to any helpful contributions that the witnesses might make in this regard and any information that they could convey concerning the impact of the legislative veto decisions on congressional executive relations from the Administration's perspective.

Generally, both Mr. Schmults and Mr. Dam interpreted recent Supreme Court actions invalidating the one-House veto in the Immigration and Nationality Act (that allowed either House to veto administrative action suspending deportation) and the two-House veto in the Federal Trade Commission Improvements Act of 1980 (that allowed both Houses to reject the FTC's proposed used car regulation) as signalling the unconstitutionality of the legislative veto

device across the board. In their view, this conclusion applied to the laws of prime interest to the committee.

Both witnesses agreed that the only unresolved issue posed by these and other legislative veto provisions after Chadha was that of severability. That is, whether the authority to which the veto is allied survives it or whether the grant and the veto are so inextricably intertwined that both elements go down together. They indicated that resolution of this issue depended upon a case-by-case review of such relevant circumstances as statutory language and legislative history.

Deputy Attorney General Schmults and Deputy Secretary of State Dam acknowledged congressional primacy in the area of policy origination and declared that recent judicial developments affecting the legislative veto did not justify any departure from formal and informal practices of sounding out Congress on matters of foreign affairs and national security.

Both witnesses voiced the belief that Chadha presented the political branches with an opportunity for bettering relations between the two in the future.

Mr. Schmults opened his prepared testimony with a pair of context-setting observations: first, despite the lingering issue of severability, escalating and exacerbating inter-branch squabbles about the legislative veto were a thing of the past by virtue of Supreme Court actions; second, the policy debate regarding congressional oversight of Executive execution of the law -- "an important issue" -- could now proceed unencumbered by a nebulous constitutional backdrop. The "clarity and scope of the Supreme Court's decisions" supplied needed certainty which would benefit "both our Branches."

As to "that policy debate", he "reiterated with emphasis" the consistent departmental position that "[t]here are many effective and fully constitutional

mechanisms whereby Congress can carry out its constitutional oversight functions."

As a preliminary to his assesement of Chadha's impact on statutes within the Committee's jurisdiction that contained legislative vetoes, Mr. Schmults described the "fundamental difference" between the decision's implications for domestic and foreign affairs. The "congressional impetus" for enacting legislative veto devices in the domestic sphere reflected the belief that major policy decisions were being made "by unelected officials who are not 'accountable' in any direct sense to the electorate." As such, he seemed to indicate that the case would have greater impact on the "'independent regulatory commissions' which ... are not subject to direct Presidential control ... and essentially are beyond the control of " both political branches.

However, this is not the case with respect to the area of foreign affairs where the Congress and the President are the principal actors. As a consequence congressional oversight of "highly visible" executive actions, rather than accountability of an invisible bureaucracy was the motive behind the legislative veto. He stated that "outside the provision of legal counsel to ... [executive] officials", his own department "has little involvement in the [] [foreign affair areas]." Nevertheless, two things were readily apparent: first, all presidential "decisions in this area implicate the Nation's foreign relations" and these decisions and relevant statutes impact on a zone of shared powers; second, for these reasons congressional oversight responses developed after Chadha should accommodate the President's "need for flexibility in meeting the exigencies of any particular situation ...."

Despite the far flung negative implications for the legislative veto and an apparent inclination by judges to find it severable from the remainder of an act, Mr. Schmults concluded that neither factor impaired the proce-

dural mechanisms contained in the War Powers Resolution, for example, and he "want[ed] to emphasize as strongly as possible that the Executive Branch will continue ... to observe scrupulously the 'reporting' and 'waiting' features that are central to virtually all existing legislative veto devices."

Deputy Secretary of State Dam testified that recent decisions signaled the unconstitutionality of the legislative veto mechanism as such and that this development, in turn, "touches upon a considerable body of legislation in the field of foreign affairs and national security." He emphasized that his views at the moment were preliminary. A more definitive expression of State Department views on the question would have to await an exhaustive case-by-case review of "the language of the statutes, their legislative history, and the record of executive-legislative relations in working with these statutes." He said that while the Department "has reached some tentative conclusions," it was "still in the process of thoroughly reviewing all the legislation with which we deal ...." He volunteered "to keep the committee informed as we proceed toward firmer judgments about the legal environment created by the Chadha decision."

Noting the central role of the separation of powers in "our constitutional system "and quoting Justice White in dissent in Chadha about "the history of the separation of powers doctrine" being "a history of accommodation and practicality", Deputy Secretary Dam said that "[t]his is the spirit with which this Administration approaches the task ahead of us."

Mr. Dam proceeded "to examine first the history of the legislative veto -- what it is, how it has worked -- and then the Chadha decision and its consequences." As to the last mentioned matter, he concluded that "the decision invalidates not only the one-House veto but the two-House veto" and 'committee veto' as well, ..." "However, [t]hose statutes which provide for Congressional

action by joint resolution -- passed by both Houses and signed by the President -- would not seem to be affected by Chadha."

Deputy Secretary Dam stated that the consultation, notice, certification, findings or report, and durational requirements typically a part of legislative veto provisions were not affected by Chadha and, accordingly "we see no reason why the Court's decision should cause a fundamental change in our relationship." He expressed the State Department's willingness "to work closely with Congress to resolve any questions or problems that may arise as a result."

Describing severability as "the key legal question" and "an intriguing" problem, Mr. Dam suggested that court tests for making that determination "established a strong presumption in favor of severability," that is, that the provision containing the legislative veto "will not affect" the remainder of the statute ...." This presumption is buttressed in "several of the statutes with which we deal -- including the War Powers Resolution and the Atomic Energy Act, for example -- by the presence of an express severability clause and that they remain "'fully operative as a law' without a veto provision."

Deputy Secretary Dam next discussed the impact of the Chadha decision "on some of the statutes that are of particular concern to the Department of State." The "first" of these statutes, the War Powers Resolution, contains "four major operative parts": the advance consultation requirement, the formal reporting requirements applicable to the use of the United States Armed Forces in various circumstances, the requirement on the President to withdraw U.S. troops not later than 60 days after a report of actual or imminent involvement in hostilities, unless the Congress has affirmatively authorized their continued presence, and, lastly, the veto requirement, whereby the President must withdraw U.S. troops introduced into hostilities even before the end of 60 days if the Congress so directs by concurrent resolution.

"The first and second provisions of the War Powers Resolution, on consultation and reporting," in Mr. Dam's view "are ... unaffected by the Chadha decision." Moreover, "[w]e do not intend to change our practice under them."

The fourth or legislative veto provision, however, "is clearly unconstitutional ...." Nevertheless, Deputy Secretary Dam said that the veto's invalidity "will [not] have a significant impact on the conduct of national security policy." "The lessons of recent history", he intimated, influence presidential behavior more than the legislative veto in the War Powers Resolution.

The third provision which requires positive congressional authorization after 60 days "does not fall within" Chadha's scope. Despite executive-congressional debate about its validity -- a debate that he saw no purpose continuing "here" -- he doubted that this automatic war-terminating feature would "be tested in the near future."

He reiterated that the presence in the War Powers Resolution of a severability clause (congressional direction in an act that invalidity of any provision shall be confined to that provision) and its workability without the legislative veto met "the Court's test and guidelines" for severing it without ill effect on the remainder of the Resolution. Futhermore, he said that he was authorized "to reaffirm the Administration's strong commitment to the principles of consulting and reporting ...."

With respect to the veto provisions applicable to certain sales and transfers of arms under the Arms Export Control Act, Deputy Secretary Dam observed that his department had made regular reports to Congress on these matters. "Indeed", the practice went beyond statutory requirements and included informal pre-notification of proposed sales. Although Chadha implied

that the Act's four veto provisions were invalid, Mr. Dam said that this did not affect other provisions of the law and that both formal and informal practices of cooperating with Congress on arms sales and transfers would continue to be followed.

The Deputy Secretary noted that Congress had attached many legislative vetoes on the international commerce in nuclear energy to further its non-proliferation policies. These provisions had three elements: strict standards limiting the export of nuclear items; presidential waiver in certain circumstances; legislative veto. Although the veto by concurrent resolution was invalid, the other elements, including their associated notice, finding, and congressional layover features continued to be valid and would be observed.

Compliance with reporting requirements applicable to granting most-favored-nation treatment to certain non-market countries only when they observe human rights also would continued to be observed.

Mr. Dam concluded as he began, with the observation that "little of practical significance need in fact change as a result of the Supreme Court decision." He reassured the committee that the State Department would continue "to work closely" with Congress and to take congressional "concerns into account in reaching decisions on issues of policy." Chadha, he said, will make Executive Branch officials, "more, not less, conscious that they are accountable for their actions."

Mr. Dam closed his testimony on the following optimistic note: "We now have an opportunity, all of us, to put much of that past [stalemates] behind us, and to start afresh. Let us shape a new era of harmony between the branches of our government -- an era of constructive and fruitful policymaking, an era of creativity and statesmanship. That is President Reagan's goal and the goal of all of us in his Administration."

In the question and answer period that followed their statements, Mr. Dam and Mr. Schmults were asked, on the basis of the previous day's testimony, whether an arms concern which lost a pending sale could challenge the arms export law. Both witnesses doubted that such a complainant could meet the requirements to raise the constitutional question. In any event, the Government would win on the merits.

Leaving aside its policy implications and its effect on congressional workload, both men were inclined to accept the constitutionality of substituting lawmaking procedures (namely, joint resolutions) to approve or disapprove imminent administrative action.

On the issue of severability, Mr. Schmults stated that there appeared to be a "trend" in its favor; however, he refused to generalize and reasserted the Chadha criteria: the presence of a severability clause, evidence of congressional intent in the legislative history on the point, and whether the veto's removal disabled or not the remainder of the act.

Deputy Secretary Dam doubted that there was any authority to sell arms independent of statutory grants and saw no benefit to Cognress from packaging proposed arms sales and submitting the package at periodic intervals for congressional review.

His views as to whether the War Powers Resolution made any substantive grants of authority were inconclusive. The veto in that Act was influential but not determinative of presidential actions in the recent past with respect to U.S. involvement in protracted hostilities. More persuasive, he believed, was the need for a consensus when taking such action and the lessons learned as a result of the Vietnam experience.

Before gaveling the hearings to a close, Chairman Zablocki reread for the record Mr. Dam's concluding remarks regarding the opportunity afforded by Chadha to mark a new beginning in congressional-executive relations. He expressed the hope that the future course of these relations vindicated the Deputy Secretary's optimism.

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APPENDIX 6

REVIEW OF TESTIMONY OF EUGENE GRESSMAN, UNIVERSITY OF NORTH CAROLINA SCHOOL OF LAW, AND DAVID A. MARTIN, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, BEFORE THE HOUSE COMMITTEE ON FOREIGN AFFAIRS

The House Committee on Foreign Affairs on July 21, 1983, concluded three days of public hearings into the impact of the Supreme Court actions striking down one- and two-House legislative vetoes with testimony from two academicians, Professor Eugene Gressman and Professor David A. Martin.

Both witnesses were eminently qualified to testify on this area of the law. Professor Gressman briefed and argued every legislative veto case as Special Counsel to the House of Representatives, including the landmark Chadha case. Professor Martin has contributed to the written literature on the subject including a lengthy law review article that questioned the legislative veto device on constitutional and functional grounds.

Chairman Clement J. Zablocki opened the hearing by summarizing the testimony of prior witnesses and introducing Professors Gressman and Martin.

Generally, both witnesses were not very sanguine about the legislative veto's future utility to control administration. Professor Gressman speculated that there was a remote possibility that the device could still be used with respect to foreign relations and appropriations matters. His views in this regard were largely based on comments made by Justices Powell and White, who concurred and dissented, respectively, in the Court's June 23, 1983, decision.

The witnesses reacted quite differently to the Chadha decision: Professor Gressman viewed it as presaging a significant shift of power from Congress to the President and Professor Martin hailed it as a harbinger of more responsible decisionmaking.

The separability issue, that is, the consequential effects of the invalidity of the legislative veto, did not figure prominently in Professor Gressman's

formal remarks except for a passing comment about the judicial trend toward severability. Professor Martin's statement largely echoed the testimony of prior witnesses, seeing it as the only question posed by existing legislative veto statutory provisions. He was of the general opinion that the Courts would strike down the vetoes but find the remainder of the acts effective and workable.

The witnesses examined the range of likely substitutes for the legislative veto, such as legislation terminating or narrowing statutory grants of authority, conditioning by law executive and agency action on passage of a joint resolution of approval or by avoiding passage of a joint resolution of disapproval, and the conduct of vigorous congressional oversight of administration of the laws.

In his formal statement to the Committee, Professor Gressman stated that it might be "premature, if not inaccurate, to say that ... Chadha ... outlaws all forms of 'veto' or disapproval of executive action in the foreign affairs area." The reasons for this guarded assessment were the particulars of the Chadha case and speculation by Justices Powell and White regarding the long range consequences of the Court's ruling. He acknowledged, however, that these judicial reservations were not consistent with other comments by the same justices that the majority opinion seemed to invalidate every use of the legislative veto. He also noted that subsequent summary High Court affirmances of lower court rulings striking down vetoes applicable to administrative action went contrary to his view of the Chadha decision's limited effect.

Professor Gressman said that the Committee had to address two questions: Did the Chadha decision indicate that the legislative veto was unconstitutional in the foreign affairs area? If so, what alternative techniques of overseeing and reviewing the President in this field were available to Congress?

In regards to the first question, Professor Gressman drew the following conclusions about the decision:

1. The Court will not exact strict compliance with threshold requirements, such as standing to sue, by persons challenging legislative veto provisions. (Standing to sue requires a plaintiff to show some threatened or actual injury to him or her traceable to the challenged action of the defendant.)

2. The Court in all likelihood will find the legislative veto provision severable "from the remainder of any given statute."

3. The decision "means that Congress cannot veto and thereby alter any action taken by the Executive in execution of what he conceives to be his duties delegated to him by statute" except by "amendatory legislation withdrawing such delegated functions from the Executive."

4. "... if Congress wants to express its disapproval of some Executive action or wants to postpone the effectiveness of some Executive action until Congress gives its approval, a new statute must be enacted and submitted to the same Executive whose action inspired congressional concern and disapproval."

5. "... Chadha extends its constitutional rule to the administrative lawmaking area ... so [that an administrative agency is] free to extend its delegated lawmaking as it sees fit, subject only to the power of Congress to ... amend or withdraw some or all of the delegated lawmaking functions."

Professor Gressman concluded this part of the analysis by saying that "the ... result of the Chadha decision is to take away from Congress ... [the] capacity, under the necessary and Proper Clause, 'to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.'" As a consequence, "the Court has succeeded in transferring to the Executive and to administrative agencies an uncontrolled power to exercise the various powers delegated to them by Congress." "The implications

of this major shift in governmental power may be most significant in the foreign affairs area."

Assuming that the Chadha ruling requires the enactment of law whenever Congress wishes to effect a binding result outside the legislative arena, Professor Gressman suggested various "options and possibilities" as substitutes for "veto provisions in statutes within ... [the committees's jurisdiction.]

The first of these is to substitute joint resolutions for concurrent resolutions "as the vehicle for either approving or disapproving Executive action." "... since joint resolutions must be adopted by both Houses and submitted to the President, they satisfy all the constitutional requirements voiced in Chadha, whether the resolutions be approving or disapproving in nature."

Stating that there was a functional difference between a limitation on appropriations and a "legislative invasion into executive administration of a statute", Professor Gressman suggested that concurrent resolutions may still have some vitality to disapprove continued foreign aid. The congressional power of the purse was not qualified by the Constitution and the President had no separate source of power which could be invoked in opposition to congressional directions of what and how to spend. Accordingly, he suggested "that serious consideration be given to retaining whatever kind of review and control techniques, including concurrent resolution vetoes, that Congress considers necessary and proper in the area of foreign and military aid expenditures."

By way of final option, Professor Gressman stated that "so called 'report and wait'" requirements "may be of some utility in the foreign affairs field." During the review layover-period Congress could enact legislation to bar presidential action. He noted that the "Chadha opinion expressly recognizes the constitutionality of this technique."

In his formal testimony Professor Martin said that the Court's "landmark decision" "was surely intended to signal that all legislative vetoes, exercised by one House or by both, are unconstitutional." Acknowledging that he agreed with the decision, he welcomed it as "a victory for sounder and more responsible decisionmaking on public policy -- a victory for the public" -- that neither hands "a clear-cut victory to the Executive nor a defeat to Congress in the long run."

He expected a period of intensive reevaluation of statutes that contain legislative veto provisions. In many instances, Congress will leave the authority granted to the President untouched, "despite the veto's demise." In other instances, Congress would carefully tailor or revoke certain delegations. And in some situations, Congress may allow for quick statutory negation of proposed executive or agency action.

After examining the implications of the Chadha decision, Professor Martin concluded: "No variant of the legislative veto ... whether exercised by a committee, by one House, or by concurrent resolution of both Houses, survives this constitutional holding." Although ordinarily he favored narrow rulings, he approved of the sweeping nature of the Supreme Court's decision in Chadha since the nagging constitutional question raised by the legislative veto now has been clearly and decisively answered. Accordingly, "Congress may now devote its full attention to adjusting the laws "cognizant of what it may and may not do. Moreover, "when the dust settles, it will become apparent that Congress still has extensive powers to check irresponsible Executive action, if only it has the will to use them."

In line with remarks of earlier witnesses, Professor Martin described the severability issue as being the only "question [that] remains concerning ... the hundreds of existing statutes containing [veto] provisions." He

generally felt that "the net of these rulings [to date supports] a strong presumption that the basic authorities will remain in place -- that is, the Executive Branch or independent agency will retain the authority delegated in the underlying statute -- and that the Court will treat the legislative veto provision as simply a 'report and wait' provision. The agency still must delay the effective date of its proposed action for the time prescribed in the statute, and Congress will retain the opportunity to disapprove within that period. But any such disapproval must come in the form of full-fledged legislation."

The result of the Court's approach favoring severability, in his view, "has many advantages in pragmatic terms. By transmuting legislative veto provisions into 'report and wait' provisions, the Court minimizes likely disruption of on-going government activities and programs during the interim period while Congress rethinks the various statutory schemes in light of the Chadha holding. Naturally, Congress has the power to terminate the delegation or to rewrite or narrow it, if Congress ultimately decides that the statute should not stand once it is shorn of the veto arrangements."

Professor Martin explored in some detail the merits of the Court's decisions both in constitutional and functional terms. As to the former, he believed "that the Chadha decision represents ... a judgment ... that Congress retains ample means to constrain the modern Executive Branch through other tools clearly at its constitutional disposal, if only Congress has the political will to use them." "[T]he functional disadvantages of the veto", he believed, "far outweigh[ed] its putative advantages in the vast majority of areas where it has been employed -- even when one takes account of legitimate worries about the modern growth of the Executive Branch. In practical terms, these functional arguments justify the Court's literal reading of the Presentment Clause."

The veto gave the appearance of an improved check on the Executive "while in reality sparing Congress" the hard choice of deciding "among the three or four or five competing options that are otherwise open." "If Congress is going to veto one, it should go ahead and say which of the other troublesome options ought to be chosen. ... If a statutory response is required, as the Court has now held, the odds are somewhat better that Congress will shoulder its full affirmative responsibilities in the course of responding to the Executive action."

In addition, the legislative veto opened up additional possibilities for governmental stalemate. "Those of us who believe our constitutional system of checks and balances already yields enough ... opportunities for stalemate are not sorry to see the Court refuse to add another."

"Without the veto, Congress still has other and more effective means to check the Executive Branch, usually by narrowing the delegation ...." Professor Martin made it clear that he did not mean that the organic authorizing statute had to go into great detail. Rather, in light of experience and to ensure greater accountability, Congress could "periodically refine and tighten the standards and guidelines of the delegation, through statutory amendment."

Professor Martin conceded that his functional arguments were stronger in the case of the regulatory agencies than with respect to "some fields -- especially in foreign affairs." In the latter "arena", "[e]vents happen too fast, and the U.S. response is too dependent on a bewildering variety of variables ... to expect that a statute can always lay out realistic and comprehensive standards in advance -- at least if we want to maintain the necessary flexibility."

Notwithstanding these difficulties, Professor Martin thought that "it would have been a mistake for the Court to have carved out a foreign affairs

exception ... in Chadha ...." First, clear boundary lines were needed to end interminable litigation and political sparring and a foreign affairs exception would have resulted in vagueness and uncertainty. Second, the legislative veto played a less significant role in congressional reassertion of authority over foreign affairs than is generally believed. "Congress already uses other constitutional controls for the most important restraints, and could apply those control models, if it chooses, in other fields where the legislative veto formerly applied."

Professor Martin saw no need to tamper with the War Powers Resolution since in his view Chadha affected only the concurrent resolution cutting short U.S. troop involvement in hostilities before the expiration of 60 days. In all other respects, including the provision for automatic termination of U.S. involvement worked by congressional refusal to declare war on otherwise affirmatively authorize such involvement before the end of the 60-day period, the Resolution continued to be a "valuable enactment". The loss of the concurrent resolution, therefore, was not that critical since Congress would likely give a President at least that much leeway unless he "went off the deep end"; in which case a two-thirds majority could be put together to pass, "over a Presidential veto, full-scale legislation that cuts off spending for the foreign military adventure or otherwise forces withdrawal of the troops."

"For these reasons, I do not believe it is necessary to alter the War Powers Resolution .... The most important protections included in that valuable enactment -- the provisions denying the President the benefit of legislative inertia and instead requiring him to secure express legislative approval if the troops are to stay longer than sixty days -- remain undisturbed."

Professor Martin observed that another foreign affairs' implicating statute affected by the Chadha decision was the two-House veto of large arms sales

under the Arms Export Control Act. Disavowing any analysis of its legislative history, he nevertheless felt that the veto was severable from the Act. The remainder of the section meant that it would function as a "report and wait" requirement. Because huge arms sales evidence foreign policy choices having the President's blessing, the substitution of a joint resolution rather than a concurrent resolution of disapproval likely meant that Congress would have to muster two-thirds to prevail. However, Congress could reverse the situation that exists under the current law and require that sales of certain magnitudes -- it could raise the monetary thresholds -- have to be approved by joint resolution. "A simple majority in one House could then prevent the sale by defeating the proposed legislation." The burden would then fall on the Administration to assemble majorities favoring the legislation in both chambers.

Emphasizing that Congress has available a range of options to check the Executive Branch, he urged the Committee to "resist the temptation to seize on a single device" and instead "examine each policy context carefully and choose the control mechanism best suited to that realm."

Professor Martin felt that in certain fields, the best check would come from redoubled efforts to assure that oversight is carried out relentlessly and effectively. Dependence on Congress for authorization and appropriations legislation made it likely that officials will heed legislators' signals.

He found the principal arguments against legislative disapprovals -- the process being cumbersome and the threat of a presidential veto -- exaggerated. The former could be reduced by proposing changes in important bills rather than in individual bills. Fears of a presidential veto, in his view were more widespread than their infrequent exercise waranted. The President in many instances would be deterred from vetoing legislation by political con-

siderations and by the fact that legislative checks on the independent regulatory agencies did not directly affect him. In such areas as war powers and rescissions (i.e., impoundments) and possibly others, that would not result in a tremendous increase in the congressional workload, Congress could reverse the situation and require approvals instead of disapprovals of proposed action.

In the question and answer period that followed delivery of their statements, both professors seemed to doubt that an arms concern would possess the requisite legal qualifications to challenge a frustrated arms sale. Professor Martin could not even envision a scenario in which such litigation could arise after Chadha.

Asked about the President°s power to make war and whether the War Powers Resolution gave him any such powers, the witnesses indicated that irrespective of their source, the law was a valid exercise of the congressional necessary and proper power to channelize its exercise (aside from the two-House veto provision).

Both witnesses saw no constitutional difference between joint resolutions approving or disapproving proposed presidential actions. In practice, however, there was a considerable difference; the former increased the congressional workload by requiring greater frequency of lawmaking but it obviated the need to muster two-thirds to override a presidential veto.

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APPENDIX 7

Effect of the Legislative Veto Decision on the Two-House Disapproval Mechanism To Terminate U.S. Involvement in Hostilities Pursuant to Unilateral Presidential Action

The decision of the Supreme Court in INS v. Chadha holding a one-House legislative veto unconstitutional and subsequent High Court action affirming a lower court ruling in United States Senate v. Federal Trade Commission invalidating a two-House veto provision have widespread implications for foreign as well as domestic policy. Nowhere was the desire to get a handle on administration of the law -- both to implement congressional policy and to curb potential abuse — more apparent than in the overlapping, sensitive fields of foreign affairs and national security. The device increasingly relied upon in recent years to carry out these twin congressional purposes has been one- and two-House resolutions of approval or disapproval of proposed Executive Branch action impacting on foreign affairs. In an appendix to his dissent in Chadha, Justice White listed some fifty-six legislative veto provisions potentially affected by the Court's decision. Conspicuously, the first sixteen fall into this category and include such high priority subjects as war powers, arms transfers and sales, national emergency authorities, and nuclear nonproliferation.

This report will discuss the impact of these recent Supreme Court actions on the two-House legislative veto contained in the War Powers Resolution that enables Congress to end presidentially initiated U.S. troop involvement in combat overseas during the initial 60-day period of hostilities. Two other key, highly controversial provisions of the Resolution that regulate presidential options to commit the U.S. Armed Forces to hostile action or potential combat situations are not implicated by the High Court's legislative veto jurisprudence. One of these effectively establishes a 60-day limit on presidential war-implicating action without positive congressional authorization. The other

provides that Congress by joint resolution may authorize a presidential exercise of the war powers for a longer period. The former sets "durational limits on authorizations" which the Court indicated are "well within Congress' constitutional power"; the latter follows all the formalities applicable to "legislative action" and is, therefore, in accord with the June 23, 1983 decision. In any event, the Court's landmark decision has no instructive value relative to these two features of what doubtless is the centerpiece of congressional efforts to reassert its policymaking function in foreign affairs in the post-Vietnam era. The War Powers Resolution.

Assessing the constitutional status of the veto in this important context is but the beginning of a two part inquiry. An ancillary but by no means subsidiary inquiry is the ripple effect of a finding of unconstitutionality of the veto itself on the act or the part of that act that incorporates it. This latter issue, termed the severability problem, has assumed critical significance given the fact that the underpinnings of Chadha and progeny are largely negative insofar as the status of the veto itself is concerned.

The War Powers Resolution

In the War Powers Resolution, 87 Stat. 555 (1978); 50 U.S.C. § 1541, Congress not only exercised its war and necessary and proper powers (§ 2(b), 50 U.S.C. § 1541(b)), but invested its hopes for realizing mutual congressional-executive cooperation in the conduct of hostilities. "It is the purpose of the joint resolution to ... insure that the collective judgment of both the Congress and the President will apply to the introduction of the United States Armed Forces into hostilities ... and to continued use of such forces in hostilities ...." § 2(a); 50 U.S.C. § 1541(a). By injecting itself early and at critical points in the policy formulation-execution process, Congress sought a more effective role in decisions about the use of the armed forces

in combat or in potential combat situations. In other words, Congress by the War Powers Resolution sought to create a deterrent to unilateral executive action, particularly action that involved the United States in protracted hostilities without a declaration of war or specific congressional authorization.

The War Powers Resolution relies on various devices to achieve these congressional goals, including advance consultation, formal reports of executive action, positive congressional authorization at the outset of hostilities or within 60 days after the onset of such hostilities, and a mechanism to end U.S. troop involvement before the expiration of the 60-day period.

Section 3 of the War Powers Resolution, 50 U.S.C. § 1542, directs the President "in every possible circumstance" to consult with Congress before committing the U.S. Armed Forces to hostile action or in circumstances of potential hostilities. This advance consultation feature is supplemented by an additional directive to the President which requires him to "consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations."

Section 4 of the War Powers Resolution, 50 U.S.C. § 1543, requires the President to report to Congress when, "[i]n the absence of a declaration of war", he takes steps which sooner or later may involve the U.S. Armed Forces in hostilities. Specifically, the President is required to submit a written report to Congress within 48 hours of introducing armed forces personnel "(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances; (2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair or training of such forces; or (3) in numbers which substantially enlarge United States Armed

Forces equipped for combat already located in a foreign nation." This initial report must describe "(A) the circumstances necessitating the introduction of the United States Armed Forces, (B) the constitutional and legislative authority under which such introduction took place; and (C) the estimated scope and duration of the hostilities and involvement." In addition, the President has to supply any other information that Congress requests and requires him to submit periodic status reports and projections -- at least every 6 months -- so long as U.S. Armed Forces are engaged in hostilities or potentially hostile situations.

Section 5, 50 U.S.C. § 1544, more than any other provision can rightfully be described as the "heart" of the War Powers Resolution. It sets durational and other limits on the President's use of U.S. troops in hostilities "[i]n the absence of a declaration of war." Generally speaking, absent positive congressional authorization, the President may not continue U.S. involvement in hostilities for more than 60 days -- 90 days if he determines and certifies in writing that "military necessity ... requires continued use of ... [the] armed forces in the course of bringing about a prompt removal of such forces." However, Congress may bring U.S. involvement in hostilities to an end before the expiration of the 60-day period by passage of a concurrent resolution.

Subsection (a) provides that "each" report relating to the introduction of the U.S. Armed Forces into actual or potential hostilities shall be transmitted to the presiding officers of the House and Senate. That report, in turn, is to be referred to the House Committee on Foreign Affairs and the Senate Committee on Foreign Relations for appropriate action. If Congress is not in session when the report is submitted, the Speaker and the President pro tempore, "if they deem it advisable" or if they are petitioned by 30 percent

of the membership of their respective Houses, "shall" request the President to convene Congress so that action may be taken.

Subsection (b) provides that "within sixty calendar days after a report is submitted or is required to be submitted" the President "shall" end U.S. troop involvement described in the report unless one of three eventualities occurs. unless Congress (1) declares war or gives specific authorization for such use of the U.S. Armed Forces, or (2) extends the 60-day period by law, or (3) is unable to convene because of an armed attack upon the United States. In other words, if at the end of the 60 days Congress has not taken positive "legislative action" specifically authorizing the President to continue hostilities, he must order the withdrawal of the troops in question. The War Powers Resolution permits a single exception from the automatic termination caused by congressional failure to enact statutory authorization. The President is allowed an additional 30 days if he "determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of the United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces."

Subsection (c) provides that the use of U.S. troops by the President without a declaration of war or specific statutory authorization can be terminated by congressional passage of a concurrent resolution. The concurrent resolution, a legislative instrument which is not submitted to the President for his approval or veto, can terminate U.S. involvement at any time before the expiration of the 60-day period. Although a literal reading of subsection (c) seems to enable Congress to terminate U.S. involvement in hostilities "at any time" irrespective of the time, both legislative history and common sense support the view that "at any time" related to the initial 60-day period after the report is or should have been submitted to Congress.

See H. Rept No. 93-287 at 5; 119 Cong. Rec. 21210 (1973) (Zablocki); 119 Cong. Rec. at 33550 (Javits), 33551 (Muskie), 33859 (Zablocki). A contrary view would introduce problems with respect to either the automatic termination feature in subsection (b) or post 60-day conduct of hostilities that have been statutorily authorized. The former automatically terminates an unauthorized U.S. commitment after 60 days, and, thus, there is no apparent need for the exercise of the legislative veto. Generally, post 60-day involvement in hostilities requires a declaration of war or statutory authorization and, clearly, the concurrent resolution was not applicable in either of these circumstances and could not be either before or after Chadha as Congress did not purpose to reserve itself the power to alter or amend statutory approval of continued hostilities by concurrent resolution.

The balance of the War Powers Resolution authorizes accelerated congressional procedures for handling a joint resolution or bill (§ 6; 50 U.S.C. § 1545) and a concurrent resolution (§ 7, 50 U.S.C. § 1546), sets forth certain relevant interpretive and definitional matters (§ 8; 50 U.S.C. § 1547), contains a "Separability clause" (§ 9; 50 U.S.C. § 1548) and makes it effective on date of enactment (§ 10, 50 U.S.C. § 1541 note), i.e., November 7, 1973.

As indicated above and as explained by the House Committee on Foreign Affairs at the time, "[t]he objective" of the War Powers Resolution "was to outline arrangements which would allow the President and Congress to work together in mutual respect and maximum harmony toward their ultimate, shared goal of maintaining the peace and security of the Nation." H. Rept. 93-287, at 5. These "arrangements" include a number of controversial and hotly contested features, such as the automatic termination provision and the requirement of positive action by Congress in the form of a law authorizing continuation of U.S. involvement in hostilities beyond 60 days. These

two provisions of the law are presumptively constitutional or, at least, not affected by recent Supreme Court actions affecting the legislative veto. This, however, is not the case with respect to the mechanism in section 5(c), 50 U.S.C. § 1544(c), whereby Congress reserved to itself the power to end hostilities in advance of the expiration of the 60-day period by passage of a concurrent resolution. The underpinnings of that provision have been shaken, if not profoundly compromised, by judicial developments in the summer of 1983.

The Legislative Veto After Chadha And Progeny

The Court in INS v. Chadha, No. 80-1832 (June 23, 1983), invalidated the one-House veto of administrative action suspending deportation on hardship grounds under section 244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1254(c)(2). The rationale for the decision is grounded in the bicameralism and presentment requirements of Article I, section 1, and Article I, section 7, clauses 2 and 3 of the Constitution. These provisions specify, respectively, that "all legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives" and that "Every Bill" as well as "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary" shall be presented to the President for an opportunity to approve or disapprove, the latter subject to override by two-thirds of both Houses of Congress. Slip op. at 25. (Emphasis in original). These "[e]xplicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process." Id. at 24-25. As described by the Court, "the prescription for legislative action in Art I, §§ 1 and 7 represents the Framers' decision that the legislative power of the Federal

government be exercised in accord with a single, finely wrought and exhaustively considered, procedure." Id. at 31. Whether actions taken by either House are the type of "legislative action" subject to the bicameralism and presentment requirements of Art. I "depends not on their form but upon whether they contain matter which is properly to be regarded as legislative in its character and effect." Ibid. Insofar as the one-House veto of the Attorney General's decision to suspend Chadha's deportation was concerned, the Court said that "[i]n purporting to exercise power defined in Art. I. § 8, cl. 4 to 'establish an uniform Rule of Naturalization,' the House took action that had the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the legislative branch." Id. at 32.

In the Court's view, the act of reversing the Attorney General's decision to suspend deportation, like the grant of the authority to make that decision, "involve[d] determinations of policy that Congress can implement ... only" by lawmaking. Id. at 34. Accordingly, "Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked." Ibid. Not insignificantly, the Court at this point in its analysis twice observed that the Constitution did not give Congress power to repeal or amend laws by other than legislative means pursuant to Art. I. Id. at 33, n. 18.

To underscore the need for compliance with the requirements of bicameralism and presentment, the Court reviewed express constitutionally authorized departures from these requirements: House impeachments and Senate trials of impeachments, Senate advice and consent to presidential appointments and treaties

negotiated by the President, and certain internal concerns of each House. The last mentioned unilateral authority, "[h]owever ... only empowers Congress to bind itself and is noteworthy only insofar as it further indicates the Framers' intent that Congress not act in any legally binding manner outside a closely circumscribed legislative arena, except in the specific and enumerated instances." Id. at 35, n. 20. The opinion concludes, saying: "To accomplish what has been attempted by one House of Congress in this case [i.e., reversal of administrative suspension of deportation] requires action in conformity with the express procedures of the Constitution's prescription for legislative action· passage by a majority of both Houses and presentment to the President." Id. at 37.

Although the immediate effect of the Chadha decision is to invalidate the one-House legislative veto provision of the Immigration and Nationality Act at issue in the case, the Presentment Clause rationale cuts the ground out from under all legislative vetoes. Thus, while a concurrent or two-House resolution of approval or disapproval comports with bicameralism, it does not satisfy the requisite of presentation to the President for approval or veto. The broader implications of the Chadha reasoning were confirmed on July 6, 1983, when the Court summarily affirmed the District of Columbia Circuit Court of Appeals decision striking down the two-House veto contained in section 21 of the Federal Trade Commission Improvements Act of 1980, 15 U.S.C § 57(a)(1)(B), that Congress exercised to reject that agency's proposed used car rule. United States Senate v. Federal Trade Commission, No. 82-935 (July 6, 1983).

The Court's June 23 decision and July 6 action establish that a one-House or a two-House veto of otherwise permitted executive or agency

action is an act of legislative power. As such, they violate the Constitution which requires that legislative power may be exercised only as provided in Art. I, §§ 1 and 7, i.e., by joint action of the House and Senate and by presentment to the President. The provision of the War Powers Resolution that permits Congress to end the involvement of the U.S. Armed Forces in hostilities seems to fall within the proscription established by these cases.

Chadha and progeny strongly indicate that the concurrent resolution mechanism whereby Congress can reverse a presidential national security decision the implementation of which involves the use of the U.S. Armed Forces in hostilities or potential hostilities is unconstitutional. Assuming that the President is authorized to use the armed forces in this manner, congressional actions inconsistent therewith would have a legislative purpose and effect. In purporting to exercise its war and necessary and proper powers under Art. I, § 8, cl. 11-16, 18, the two-House action authorized by the War Powers Resolution has "the purpose and effect of altering the legal rights, duties and relations of persons including the" President and "Executive Branch officials, ... all outside the legislative branch." INS v. Chadha, at 32. Clearly, aside from the veto provision of the War Powers Resolution, neither one nor both Houses of Congress could negative a presidential determination pursuant to lawfully delegated authority except by law (e.g., cutting off appropriations for support of U.S. forces abroad). Nor does the fact that Congress by law delegated the authority and by that or some other law provided for the legislative veto alter this result. "Congress's authority to delegate ... power ... provides no support for the argument that Congress can constitutionally control administration of the laws by way of a Congressional veto." Id. at 33, n. 40.

The essence of legislative veto conceptual constructs and the actuality in the overwhelming number of cases are that it operates as a check on congressional delegations of portions of legislative power. For example, the Arms Export Control Act (AECA), 22 U.S.C. § 2751 et seq., the basic authority for arms sales, arms transfers and the lease or loan of military hardware, is bottomed on the congressional power to regulate commerce, which includes the commerce in arms, and the power to tax and spend for the general welfare, which underlies the provision of military assistance. In the AECA, Congress has delegated to the President significant authority to administer the program in conformity with statutorily prescribed standards and conditions. Coincident with this statutory grant of authority pursuant to its commerce and taxing and spending powers, Congress has reserved to itself the power to disapprove by concurrent resolution proposed arms sales, arms transfers and arms leases or loans that exceed certain monetary thresholds. 22 U.S.C. §§ 2753(d)(2), 2776 (b)(1), 2776(c)(1), 2796b.

The AECA follows both the conceptual model and the pattern of the statutes recently overturned by the courts. That is, the same law delegates authority and subjects its exercise to a congressional check in the form of simple one-House or two-House concurrent resolutions. For analytical purposes it would make no substantive difference that the delegated authority and the veto device are in two distinct laws. See, for example, the National Emergencies Act, 90 Stat. 1255 (1976), 50 U.S.C. § 1601 et seq., which imposes a procedural framework that includes a two-House veto applicable to the exercise of authority delegated in countless other statutes that are activated by a presidential declaration of national emergency.

The War Powers Resolution has more in common with the National Emergencies Act than with either the Immigration and Nationality Act and the Federal

Trade Commission Improvements Act of 1980 adversely affected by recent judicial developments or the AECA. The similarity between the first two mentioned acts is hardly surprising since the National Emergencies Act in various ways was influenced by the War Powers Resolution. See, for example, S. Rept. No. 94-1168 at 5. On a more fundamental level, the similarity between these two acts is evidenced by the fact that neither purports to delegate authority, but to impose a procedural framework on delegations made in other sources. Id. at 3. H. Rept. No. 93-287 at 13.

As indicated earlier, the National Emergencies Act was intended to operate "on powers and authorities available to the Executive, pursuant to approximately 470 statutes, as a result of ... [a declared] state[] of national emergency ...." S. Rept. No. 94-1168 at 2. Although these "powers and authorities" are not specifically enumerated in the National Emergencies Act, they are a known quantity and the Members of the 94th Congress were well aware of them at the time of the law's enactment. See Emergency Power Statutes: Provisions Of Federal Law Now In Effect Delegating To The Executive Extraordinary Authority In Time Of National Emergency, S. Rept. No. 93-549.

The War Powers Resolution likewise imposes a procedural framework on presidental exercises of powers and authorities but in a different context, powers and authorities relating to war. However, in contrast to the National Emergencies Act, both the source(s) and the scope or range of the relevant powers and authorities are at best uncertain in the war powers area. Although these elemental differences are not so fundamental as to insulate the War Powers Resolution from the implications of Chadha and progeny, as they relate to either the status of the legislative veto or to the severability issue, they vary from the factual circumstances of those cases and, accordingly, some additional explanation is required.

To begin with, the War Powers Resolution impacts on an area of shared congressional-executive powers rather than the more usual situation where the legislative veto serves as a check on delegations of plenary and frequently exclusive congressional powers under Art. I, § 8. Although the subject has been debated throughout the Nation's history, the line between the respective powers of the President and Congress in this area is not clear, and, if anything, has become murkier with the passage of time.

The records of the debates at the Constitutional Convention on the division of the war powers between the two political branches are sparse. Two points emerge from the available documentation: first, as with the English monarch, the President is Commander in Chief of the Army and Navy; however, unlike the King, he alone was not authorized to commit the United States to war. The Federalist No. 69, at 465 (J. Cooke ed. 1961) (Alexander Hamilton). Second, by vesting Congress with the power to "declare" war rather than to "make" war as originally proposed, the Framers "[left] to the Executive the power to repel sudden attacks." 2 The Records of the Federal Convention of 1787, at 318-319.

Additionally, there is legal support for the proposition that the nation has the right under conventional international law to use force to protect citizens and nationals abroad. 12 Whiteman Digest of International Law 187 (1971). Also, there are suggestions in case decisions that the President as Commander in Chief is the chief instrument to carry it out. "Now, as respects the interposition of the Executive abroad, for the protection of the lives and of property of the citizen, the duty must, of necessity, rest in the discretion of the President. Acts of lawless violence or of threatened violence to the citizen or his property, cannot be anticipated and provided for, and the protection to be effectual or of any avail, may, not infrequently, require the most prompt and decided action. Under our system of Government,

the citizen abroad is as much entitled to protection as the citizen at home. The great object and duty of Government is the protection of the lives, liberty, and property of the people composing it, whether abroad or at home, and any government failing in the accomplishment of the object or the performance of the duty, is not worth preserving." Durand v. Hollins, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860).

However, aside from "repel[ling] sudden attacks" and safeguarding citizens and nationals of the United States abroad, there seems to be little agreement as to what more is imported by the Commander in Chiefship Clause. Art. II, § 3. In this connection, Justice Jackson, concurring in the Steel Seizure Case, observed: " ... of course, they [the words of the Clause] imply something more than an empty title. But just what authority goes with the name has plagued presidential advisers who would not waive or narrow it by nonassertion yet cannot say where it begins or ends. It undoubtedly puts the Nation's armed forces under presidential command. Hence, this loose appellation is sometimes advanced as support for any presidential action, internal or external involving the use of force, the idea being that it vests power to do anything, anywhere, that can be done with an army or navy. ... I cannot foresee all that it might entail if the Court should indorse this argument. Nothing in our Constitution is plainer than that declaration of war is entrusted only to Congress. Of course, a state of war may in fact exist without a formal declaration. But no doctrine that the Court could promulgate would seem to me to be more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture." Youngstown Co. v. Sawyer, 343 U.S. 579, 634, 641-642 (1952).

The division of powers between the Congress and President vexed the legislators in formulating and passing the War Power Resolution. Although this thorny problem was confronted head-on by the Senate version of the legislation (cf. § 2(c), 50 U.S.C. § 1541(c)), the compromise that became law over a presidential veto fails to illuminate and, indeed, effectively disclaims any intent to alter that boundary. Section 8(d)(1); 50 U.S.C. § 1547(d)(1), accordingly provides that nothing in the War Powers Resolution "is intended to alter the constitutional authority of the Congress or of the President ...."

For these reasons, it is difficult to postulate a source of constitutional power that would enable the President to involve the Armed Forces of the United States in other than the two described circumstances. Moreover, the assertion of a constitutional source of presidential power that would authorize him to use troops beyond those circumstances might open a Pandora's Box of problems, not the least of which would be the questionable constitutionality of the War Powers Resolution for reasons unrelated to the legislative veto or of any legislation that sought to restrict or confine the President's war powers except to deprive him of the armed forces or funds to maintain them. "He [the President] has no monopoly of the 'war powers,' whatever they are. While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army or navy to command. It is also empowered to make rules for the 'Government and Regulation of the land and naval Forces,' by which it may to some unknown extent impinge upon even command functions." Jackson, J., concurring, 343 U.S. at 644.

If the authority to use troops in circumstances other than to "repel sudden attacks" and protect U.S. citizens or nationals is not derived from the Constitution, what, it may be asked, gives the President that authority? As indicated, the War Powers Resolution does not in clear words confer that authority. Rather than an express grant of authority, this legislation in strict

terms operates on an occurrence: "... in any case [except congressional declared war] in which United States Armed Forces are introduced ..." etc. § 4(a), 50 U.S.C. § 1543(a).

Not only does the War Powers Resolution fail to provide an express, unequivocal grant of relevant authority, it seems to deny the effectiveness of any such grant contained in statutory or treaty sources and even appears to deny that the Resolution itself intends to make any conferral. For example, section 2(c), 50 U.S.C. § 1541(c) contains a statement of the "powers of the President as Commander-in-chief to introduce United States Armed Forces in hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, ..." It states that such powers can be "exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces." Paradoxically, however, "[s]ubsequent sections of the joint resolution are not dependent upon the language of this subsection ...." H. (Conference) Rept. No. 93-547 at 8. Stated differently, this subsection is declaratory rather than mandatory or binding.

Section 8(a); 50 U.S.C. § 1547, relating to "Interpretation of joint resolution", deals with its construction, intent and effect. Subsection (a)(1) provides that authority to commit U.S. troops cannot be inferred "from any provision of law (whether or not in effect before the date of the enactment of this joint resolution), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this joint resolution ...." The Senate Foreign Relations Committed stated that "[t]he purpose of this clause is to counteract the opinion in

the Orlando v. Laird decision holding that passage of defense appropriation bills, and extension of the Selective Service could be construed as implied Congressional authorization for the Vietnam War." S. Rept. No. 220, 93rd Cong., 1st Sess. at 25.

Subsection (a)(2) provides that the authority to commit U.S. troops cannot be inferred "from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution." This subsection has a dual purpose.

> "First, is to ensure that both Houses of Congress must be affirmatively involved in any decision of the United States to engage in hostilities pursuant to a treaty. Treaties are ratified by and with the consent of the Senate. But the war powers of Congress are vested in both Houses of Congress and not in the Senate (and President) alone. A decision to make war must be a national decision. Consequently, to be a truly national decision, and, most importantly, to be consonant with the Constitution, it must be a decision involving the President and both Houses of Congress.
>
> "Second, the provisions with respect to treaties are important so as to remove the possibility of future contention such as arose with respect to the SEATO Treaty and the Vietnam War." S. Rept. No. 220 at 26.

The thrust of these twin provisions in section 8(a) of the War Powers Resolution, 50 U.S.C. § 1547(a), is to effectively counter any authority of

the President to use U.S. troops that may be inferred in any law (or its constitutional equivalent, any treaty) enacted by Congress (or approved by the Senate) before its enactment. Moreover, no similar inference can be drawn from laws (or treaties) subsequent to its enactment unless they make clear that they are the specific authorization required by the War Powers Resolution.

Finally, the War Powers Resolution seems to provide in section 8(d) that it is not authority to commit U.S. troops. That subsection states that "[n]othing in this joint resolution ... shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities ... which authority he would not have had in the absence of this joint resolution." (Emphasis added.) Although it is possible to read this provision in various ways, the stated purpose was to negative any intent to grant any authority above and beyond that which the President previously had. H. Rept. No. 93-287 at 13. Additional support for this view is supplied by section 4's reporting requirement which provides that the report "set[] forth ... (B) the constitutional and legislative authority under which such introduction took place ...." 50 U.S.C. § 1544(a)(B).

The House Foreign Affairs Committee report disclaims any intent in sections 5 and 8 to "grant authority to the President to act for" the specified period but that read together the former "should be considered a specific time limitation upon any power to act assumed by the President from sources other than a specific authorization by Congress." Id. at 10. Elsewhere, the report observes that unilateral presidential actions that "commit[] U.S. Armed Forces to hostilities abroad "in effect, assume[] congressional authority." Accordingly, it concludes that "[u]nder this war powers resolution the Congress can rescind that authority as it sees fit by concurrent resolution ...." Id. at 14.

Since the obvious purpose behind the War Powers Resolution was to impose a procedural framework on a dynamic of uncertain contours -- the source and scope of the respective congressional and executive war powers -- it is not unexpected that that legislation would leave various matters unresolved. For example, what are the relevant sources of presidential powers and authorities beyond the two previously mentioned ones that flow from Article II of the Constitution? If the War Powers Resolution neither expressly nor impliedly delegated authority, how can it subsume delegations from other sources, such as other laws or treaties, the effectiveness of which for purposes of committing troops to actual or potential combat situations is rejected in section 8? While the Resolution speaks in terms of delegated authority to deny that it makes any, it characterizes the President's activities in its context in terms of acts or actions in seeming isolation of any acknowledged or specific authority. Can the two lawfully coexist independent of each other? If, as the House report suggests, individual presidential initiatives in this area constitute an assumption of "congressional authority", how can the exercise of that authority for up to 60 days be rationalized absent an express or implied delegation?

The existence of tension among various provisions of the War Powers Resolutions and between it and the Commander in Chiefship powers seems undeniable. The former is illustrated by the palpable conflict between the statement of "Purpose and Policy" in section 2(c), 50 U.S.C. § 1541(c), which purports to exhaust the range of the lawful involvement in hostilities to three specified situations, and the "Reporting" and "Congressional action" requirements in sections 4 and 5 that accept the fact of such involvement as long as the President complies with such requirements and Congress does not adopt a concurrent resolution of disapproval. An example of the latter is the seeming

conflict between the same "Purpose and Policy" section and the range of pure Article II initiatives. The uncertainty is measurably increased by the aforementioned legislative history which indicates rather unequivocally that that section is not deemed to be controlling of the substantive provisions of the War Powers Resolution.

While these perplexities have to be considered in assessing Chadha's impact on the War Powers Resolution, both in terms of the legislative veto and severability, they do not insulate the Resolution from challenge. True, most of the known legislative veto decisions have involved the use of the device in the context of authority delegated in the same statute. However, the doctrines of these cases are not limited to that circumstance. The defect in the legislative veto cases is not statutory delegations of authority but congressional attempts by means short of law to reverse a particular exercise of authority. Accordingly, the source of authority -- arguably, even exercises of questionable authority -- seems irrelevant insofar as the result is concerned. Since the legislative veto in the War Powers Resolution has the purpose and effect of altering presidential decisions and relations of persons outside the legislative arena, it falls within the proscription established by Chadha and progeny which hold that congressional actions that have this purpose and effect can "only" be implemented by law. INS v. Chadha at 34.

The Severability Problem

A judicial determination that a statutory legislative veto provision is unconstitutional is not the end of the matter. Thereafter, the Court must determine whether the unconstitutional veto provision can be isolated or severed from the delegated authority or other matter to which it is annexed or whether the two are so inextricably intertwined that both must fall. The general rule established by earlier cases and reaffirmed by the Court in

Chadha is "that the invalid portions of a statute are to be severed '"[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not."'" Id. at 10, citing Buckley v. Valeo, 424 U.S. 1, 108 (1976), quoting Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 310, 234 (1932).

Resolution of the issue of severability involves consideration of three factors. The first factor to be considered is the presence or absence in the law of a severability clause, a provision whereby "Congress itself has provided the answer to the question of severability." INS v. Chadha, at 11. These clauses typically provide that judicial invalidation of any provision of an act, or its application to any person or circumstance, does not affect the remainder of that act or even the affected provision as it applies to other persons or in other circumstances. A severability clause creates a "presumption that Congress did not intend the validity of the Act as a whole, or of any part of the Act, to depend upon whether the [challenged provision] was invalid." Ibid.

Since a severability clause does not conclusively resolve the issue, the second factor that has to be considered is whether the presumption of severability it creates conforms to the intent of the lawmakers. This inquiry, termed "an elusive inquiry" by the Court, requires an examination of the legislative history of the provision for evidence that either supports or rebuts the presumption. Ibid.

The final factor to be considered is whether the provision less the severed part "survives as a workable administrative mechanism." Id. at 14. By implication, if the provision absent the veto is not functionally operable, the entire provision or act falls.

In summary, resolution of the severability issue in these circumstances depends upon a case-by-case review of the language of the act, its legislative history, and its ability to operate independent of the veto.

The Court in Chadha held the veto provision severable from the remainder of the section. This result was achieved by virtue of the broad severability clause in section 406 of the Immigration and Nationality Act, 8 U.S.C. § 1101, and the Court's reading of the legislative history of the administrative deportation suspension provision. The presumption raised by the clause found support in the Court's finding that the legislative history evidenced congressional "irritation with the burden of private immigration bills" and an overriding desire to rid itself of that burden. Id. at 13.

The War Powers Resolution and Severability

The application of severability legal principles and criteria reasserted in Chadha lead to a similar result in the case of the War Powers Resolution. Notwithstanding some conceptual difficulties traceable to the previously described problem regarding the source of presidential authority to involve the U.S. Armed Forces in action or potential combat situations, the factors favoring severance of the concurrent resolution without ill effect on the balance of this legislation seem fairly persuasive.

A prime factor in this regard is the presence in the War Powers Resolution of a severability clause which tracks that in the Immigration and Nationality Act. In summary, "Congress itself has provided the answer to the question of severability in [section 9 of the War Powers Resolution, 50 U.S.C. § 1548,]" which provides:

> "If any provision of this joint resolution or the application thereof to any person or circumstance is held invalid, the remainder of the joint resolution and the application of such provision to any

other person or circumstance shall not be affected thereby."

(Emphasis added.)

In the Court's words in Chadha, "[t]his language is unambiguous and gives rise to a presumption that Congress did not intend the validity of the Act as a whole, or any part of the Act, to depend upon whether the veto clause ... was invalid. The ... veto provision ... is clearly a ... provision of the Act as that language is used in the severability clause. Congress clearly intended 'the remainder of the Act' to stand if "any ... provision" were held invalid. Congress could not have more plainly authorized the presumption that the provision for a ... veto ... is severable from the remainder of ... [the section] and the Act of which it is a part." INS v. Chadha at 11.

The Court's observation in this regard seems particularly apt in connection with the veto provision in the War Powers Resolution. In this circumstance, there exists not only a severability clause applicable to "any provision" but the subsection which provides for the legislative veto relates exclusively to the veto and nothing else. In other words, section 5(c), 50 U.S.C. § 1544(c), is a discrete provision not only disassociated from any immediate delegation to the President, but it is also structurally independent of the associated report and time requirements which are set forth in section 5(a) and (b), respectively. 50 U.S.C. § 1544(a), (b). As the Resolution purports not to be a delegation, and disclaims any intent to "alter constitutional authority", the usual thorny question of whether Congress would have delegated authority without the veto seems irrelevant.

Nothwithstanding that these factors seem to obviate the need to "embark on that elusive inquiry", the presumption as to the severability of the two-House veto provision in section 5(c) finds support in legislative

history. INS v. Chadha at 11. As indicated, that subsection was part of the House version of the legislation that the conference committee adopted instead of the Senate proposal. Ironically, the latter authorized a constitutionally acceptable mechanism to effect congressional termination of U.S. involvement in hostilities before the onset of automatic termination, namely, enactment of a bill or joint resolution. The Senate conferees to some extent were won over by the House conferees because the conference accepted the provision for automatic termination of U.S. involvement. The War Powers Resolution [Committee Print], H. Comm. on Foreign Affairs, 150 (1982).

Although Congress, and especially the House, attached great significance to the concurrent resolution mechanism to counter presidential war-related decisions, these statements may not be "sufficient to overcome the presumption of severability raised by ... [the clause]." Ibid.

As noted, section 5(c) of the War Powers Resolution, 50 U.S.C. § 1544(c), provides for termination of the President's action committing U.S. troops to combat in a foreign country by passage of a concurrent resolution before the end of the 60-day period. The report of the House Committee on Foreign Affairs described "[s]ubsection (c) ... [as] another of the resolution's major provisions" and "the heart of" that subsection. H. Rept. No. 93-287 at 10, 11. (Emphasis added.) Of particular appeal to the House Foreign Affairs Committee was the mechanism's avoidance of a presidential veto: "... it ... avoids the possibility of a presidential veto — and resulting impasse -- which would be possible on a bill or a joint resolution." Id. at 11. Similar expressions were made during House floor consideration of the measure. E.g., 119 Cong. Rec. 24689 (Cong. Zablocki), 24690 (Cong. Bingham) (1973).

The fact that Congress enacted the War Powers Resolution over a presidential veto is additional evidence of congressional reluctance to surrender the

veto check on actions by the President. In his veto message, President Nixon set out various objectionable features of the legislation. He specifically denounced section 5(c) as "allow[ing] the Congress to eliminate certain authorities merely by the passage of a concurrent resolution -- an action which does not normally have the force of law, since it denies the President his constitutional role in approving legislation." 9 Weekly Comp. Pres. Doc. 1285-87 (1973). Congressional steadfastness in these circumstances cannot be casually dismissed.

Despite the probity of these congressional statements and actions, Congress in the War Powers Resolution was not squarely faced with the normal situation of making a delegation with or without the veto. As indicated earlier, Congress viewed the War Powers Resolution as imposing a framework either on delegations made in unspecified sources or on the exercise of "assumed congressional authority." H. Rept. 93-287 at 14. At least as important as the veto check on presidential action, was the obvious desire of Congress to assert its share of the 'shared" war powers. This point is evident throughout the legislative history and conspicuously in the House report which states:

> "In shaping legislation to that purpose [to restore the constitutional balance], the intention was not to reflect criticism on activities of Presidents, past or present, or to take punitive action. Rather, the focus of concern was the appropriate scope and exercise of the power of war in order that the Congress might fulfill its responsibilities under the Constitution while permitting the President to exercise his responsibilities.
>
> "The objective, throughout the consideration of war powers legislation, was to outline arrangements which would allow the

President and Congress to work together in mutual respect and maximum harmony toward their ultimate, shared goal of maintaining the peace and security of the Nation." Id. at 4-5. Emphasis added)

Doubtless the unavailability of the veto device to cut short U.S. involvement in hostilities would have been keenly felt by many Members, particularly on the House side of the Capitol. However, it is the War Powers Resolution's other features which arguably conduce to cooperative undertakings in this critical area, namely, prior and ongoing consultation and initial and subsequent presidential reports to Congress. Also, it is questionable whether the veto device measurably enhances presidential willingness to respect congressional prerogatives and to cooperate with legislators over and beyond the inducements in the Resolution's automatic termination provision and the requirement of positive congressional action for involvement in hostilities after the initial 60-day period. These considerations along with congressional monopoly over authorization and appropriation processes, in the nature of things, are consonant with the stated goals of achieving peace and national security on the basis of "mutual respect and maximum harmony" between the political branches. Ibid.

Finally, there seems little need to cite the legislative history regarding the reasons for legislation along the lines of the War Powers Resolution. Vietnam and the Nation's sad experience in the southeast Asian conflict form the general background. In particular, judicial notice can be taken of the fact that Congress passed this legislation in the waning moments of that conflict in order to deal with the problem of protracted future involvements in hostilities without either a declaration of war or specific congressional authorization. When measured against the yearslong character of U.S. involvement in Vietnam, the 60 days afforded by the Resolution without the

veto seems to be of a different magnitude. That much seems implied by establishing 60 days as the threshold which thereafter requires positive congressional action for continuing hostilities. While post legislative developments are usually discounted in assessing congressional intent, e.g., Consumer Product Safety Com'n v. GTE Sylvania, 447 U.S. 102, 117 (1980), a similar implication flows from legislative acquiescence in short term presidential use of the armed forces in combat or potential combat situations on foreign soil since 1973. There was the rescue of the Mayaguez and its crew in 1975, the airlift of European troops in Zaire in 1978, the attempted rescue of U.S. hostages in Iran in 1980, and more than a half dozen other instances. Indeed, in two circumstances that have exceeded 60 days, specifically the second dispatch of Marines to Lebanon in 1982 and the increase in military advisers in El Salvador in 1981, Congress has not brought the issue to a head by formal action. In dismissing litigation challenging the President's failure to file a report on the latter, the court noted that Congress had taken no action indicative of a belief that that action was subject to the War Powers Resolution. Crockett v. Reagan, 558 F. Supp. 893 (D.D.C. 1982).

Insofar as the final severability criteria is concerned, it seems clear that the War Powers Resolution is "'fully operative' and [constitutes a] workable administrative machinery without the veto provision." INS v Chadha at 13. Even without the veto, the most important provisions of the Resolution survive and are fully operable. The President must consult with Congress in advance of taking action and he must report and justify his action to Congress. The Resolution expressly provides that he may not introduce troops into actual or potential hostilities and keep them there longer than 60 days unless he receives express statutory authority or

a declaration of war from Congress. As a result, at least after the initial 60 days, the burden of overcoming legislative inertia is on the President. If he is unable to persuade Congress of the merits of his cause, he must pull the troops out. "Clearly, ... [the War Powers Resolution] survives as a workable ... mechanism without the ... [two]-House veto." Id. at 14.

Summary

Notwithstanding differences between the War Powers Resolution and conceptual or statutory models — differences largely attributable to the shared nature of the power on which it operates -- Chadha and progeny have adverse implications for its legislative veto provision. Irrespective of the source from which the President's power in this context is derived, the exercise of the veto in these circumstances has the purpose and effect of altering rights, duties and relations of persons outside the legislative branch. The Resolution's veto, therefore, is constitutionally suspect since the act of reversing the President "involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President." INS v. Chadha at 34.

Despite the legislative veto's obvious appeal to Congress and particularly the House of Representatives, criteria for determining severability favor severance of the concurrent resolution without any further detrimental effect on the other provisions of the War Powers Resolution. The presence in the legislation of a severability clause and the independence of the Resolution's other provisions from the veto leave a workable mechanism without it. Unequivocal expressions of congressional sentiment regarding the importance of the veto more than likely do not rebut the presumption established by the severability clause. Moreover, severability in these circumstances is in harmony with other congressional goals connected with the War Powers

Resolution, namely, establishing an "arrangement[]" whereby "the Congress might fulfill its responsibilities under the Constitution while permitting the President to exercise his responsibilities." H. Rept. 93-287 at 4, 5.

Epilogue

The legislative veto in the War Powers Resolution serves an important but limited function in regulating a particular exercise of the national war powers. It comes into play only if Congress wants to effect the removal of the U.S. Armed Forces from combat before the 60-day period has elapsed. Whether its apparent loss represents a major setback in the congressional scheme of regulation is debatable. In any event, that question is one that only Congress can answer.

Constitutionally acceptable alternatives to the veto are readily available. One option is to replace the concurrent resolution with a bill or joint resolution as was proposed in the Senate version of the War Powers Resolution. Another option would be to write in a "report and wait" requirement which would give Congress the opportunity to review a presidential decision involving the use of troops overseas and to pass legislation in support or barring the implementation of that decision. The same approach may be followed except that rather than barring implementation of the President's decision, the legislation would reverse action previously taken. In one case the legislation would operate as a condition precedent whereas in the other it would act as a condition subsequent to presidential action.

The "power of the purse" alone or in combination with any of the above suggestions imports other ways of restricting war related activities by the President. For example, forerunners of the War Powers Resolution sought to

achieve their war-limiting and congressional involvement objectives by withholding funds from the President for military activities. The War Powers Resolution (Committee Print) at 59.

These suggested options do not exhaust the range of possible alternatives. The latter suffer only two constraints: the Constitution and immagination. Their advisability and workability, on the other hand, raise matters for resolution by policymakers.

Alternatively, Congress might find the present situation tolerable and workable and leave the War Powers Resolution as is despite the implications for the concurrent resolution of Chadha and progeny. Noting that the veto provision had fairly constrained durational and other limits, one commentator has observed --

> " ... the effect [of Chadha] is quite minor -- and not only because the period at issue can last at most for a matter of several weeks. More fundamentally, only in the most extraordinary of political circumstances will Congress defy a sitting President who has introduced troops on his own. Realistically, Congress is not going to rally even a simple majority for a veto resolution unless the President has virtually gone off the deep end, introducing troops in a way clearly and immediately condemned by the overwhelming majority of the public. And if the President's error is that manifest, I submit, Congress not only will assemble a majority to disapprove the troop deployment but also, almost surely, can put together a two-thirds majority to pass, over a Presidential veto, full-scale legislation that cuts off spending for the foreign military adventure or otherwise forces withdrawal of

the troops." Statement of Professor David A. Martin, University of Virginia School of Law On "The Legislative Veto Decision And Congressional Response" Before The Committee On Foreign Affairs, U.S. House Of Representatives, July 21, 1983.

In the final analysis, leaving aside their values as leverage and symbolism, Chadha and progeny signal that substitutes for the legislative veto entail lawmaking. The congressional power to enact laws is a constitutional given; it does not require antecedent legislation effectively stating that Congress can enact a statutory remedial cure.

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APPENDIX 8

EFFECT OF THE LEGISLATIVE VETO DECISION ON THE TWO-HOUSE DISAPPROVAL MECHANISM APPLICABLE TO THE SALE, TRANSFER, AND LEASE OR LOAN OF ARMS, BY RAYMOND J. CELADA, SENIOR SPECIALIST IN AMERICAN PUBLIC LAW, AMERICAN LAW DIVISION, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS

The decision of the Supreme Court in INS v. Chadha holding a one-House legislative veto unconstitutional and subsequent High Court action affirming a lower court ruling in United States Senate v. Federal Trade Commission invalidating a two-House veto provision have widespread implications for foreign as well as domestic policy. Nowhere was the desire to get a handle on administration of the law -- both to implement congressional policy and to curb potential abuse — more apparent than in the overlapping, sensitive fields of foreign affairs and national security. The device most frequently relied upon in recent years to carry out these twin congressional purposes has been one- and two-House resolutions of approval or disapproval of proposed Executive Branch action impacting on foreign affairs. In an appendix to his dissent in Chadha, Justice White listed some fifty-six legislative veto provisions potentially affected by the Court's decision. Conspicuously, the first sixteen fall into this category and include such high priority subjects as war powers, arms transfers and sales, national emergency authorities, and nuclear nonproliferation.

This report will discuss the impact of these recent Supreme Court actions on the legislative veto in the area of arms exports. Under the governing law, the President has to submit proposed arms aid, arms sales, and arms leases or loans that exceed certain monetary thresholds to Congress for review and possible rejection by concurrent or two-House resolution.

Resolution of the constitutional status of the veto in this important context is but the beginning of a two part inquiry. An ancillary but by no means subsidiary inquiry is the ripple effect of a finding of unconstitutionality of the veto itself on the act or the part of that act that incorporates

it. This latter issue, termed the severability problem, has assumed critical significance given the fact that the underpinnings of Chadha and progeny are largely negative insofar as the status of the veto itself is concerned.

The Arms Export Control Act

The basic statutory control mechanism regulating transfers, sales and leases of arms is the Arms Export Control Act (AECA), as amended, 22 U.S.C. § 2751 et seq. The AECA provides for legislative vetoes in three general circumstances: (1) cash, credit, or commercial sales of defense articles and services; (2) third country transfers of U.S. Government supplied defense articles and services; and (3) leases or loans of U.S. defense articles.

Section 36(b)(1) of the AECA, 22 U.S.C. § 2776(b)(1) provides that Congress by concurrent resolution may disapprove a sale of major defense equipment valued at $14 million or more, a sale of defense articles or services valued at $50 million or more, or a sale of design and construction services valued at $200 million or more. The President must submit all proposed U.S. Government sales of these items at or above the specified dollar thresholds to Congress together with a detailed explanation of the relevant whys and wherefores. Congress has thirty calendar days following receipt of this information to disapprove it. Fifteen days are authorized in the case of a proposed sale to NATO, NATO member states, Japan, Australia, and New Zealand. However, the President may waive the otherwise mandatory congressional review procedures by certifying "that an emergency exists which requires the proposed sale in the national security interests of the United States."

Section 36(c)(1) of the AECA, 22 U.S.C. § 2776(c)(1) provides that all proposed commercial arms sales -- sales covered by a Department of State approved export license — of major defense equipment valued at $14 million or

more or of defense articles or services valued at $50 million or more must be submitted to Congress by the President. Any proposed sale of this nature may be vetoed by action of the House and Senate within thirty calendar days of its submission to Congress. NATO, NATO member states, Japan, Australia, and New Zealand are exempt from the veto provision. As in the case of government sales, the President may waive the otherwise mandatory congressional review procedure by certifying "that an emergency exist which requires the proposed export in the national security interests of the United States."

Section 3(d)(2) of the AECA, 22 U.S.C. § 2753(d)(2) provides that Congress by concurrent resolution may prevent the transfer of U.S. supplied defense articles and services by the original recipient country or international organization. The President is required to report to Congress any proposed transfer of specific items obtained not only under the AECA but also items provided under sections 505(a)(1) and 505(a)(4) of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. §§ 2314(a)(1) and 2314(a)(4) when such items consist of any major defense equipment valued at $14 million or more or any defense article or related training or other defense service valued at $50 million or more. Within thirty calendar days of being notified of any such proposed transfer, Congress may block it by passing a concurrent resolution of disapproval. A shorter congressional review period, fifteen calendar days, is authorized in the case of transfers to NATO, NATO member states, Japan, Australia, and New Zealand. The President may waive review of the last mentioned transfer by making a certification along the lines described in connection with government and commercial sales.

Section 63(a)(1) of AECA, 22 U.S.C. § 2796b subjects leases of defense articles under the Act and loans of similar articles under chapter 2 of part

II of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2311 et seq., of at least one year duration to disapproval by concurrent resolution. As in the case of the other veto provisions contained in the AECA, the one applicable to leases and loans applies to leases and loans of major defense equipment valued (replacement cost less depreciation) at $14 million or more or defense articles valued (replacement cost less depreciation) at $50 million or more. Congress has thirty calendar days to block the agreement. NATO, NATO member states, Japan, Australia and New Zealand are exempt from the veto provision. The President has authority to waive review requirements by determining and reporting to Congress that an emergency with implications for United States security interests justifies the loan or lease.

The Legislative Veto After Chadha And Progeny

The Court in INS v. Chadha, No. 80-1832 (June 23, 1983), invalidated the one-House veto of administrative action suspending deportation on hardship grounds under section 244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1254(c)(2). The rationale for the decision is grounded in the bicameralism and presentment requirements of Article I, section 1, and Article I, section 7, clauses 2 and 3 of the Constitution. These provisions specify, respectively, that "all legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives" and that "Every Bill" as well as "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary" shall be presented to the President for an opportunity to approve or disapprove, the latter subject to override by two-thirds of both Houses of Congress. Slip op. at 25. (Emphasis in

original). These "[e]xplicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process." Id. at 24-25. As described by the Court, "the prescription for legislative action in Art I, §§ 1 and 7 represent the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure." Id. at 31. Whether actions taken by either House are the type of "legislative action" subject to the bicameralism and presentment requirements of Art. I "depends not on their form but upon whether they contain matter which is properly to be regarded as legislative in its character and effect." Ibid. Insofar as the one-House veto of the Attorney General's decision to suspend Chadha's deportation was concerned, the Court said that "[i]n purporting to exercise power defined in Art. I, § 8, cl. 4 to 'establish an uniform Rule of Naturalization,' the House took action that had the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the legislative branch." Id. at 32.

In the Court's view, the act of reversing the Attorney General's decision to suspend deportation, like the grant of the authority to make that decision, "involve[d] determinations of policy that Congress can implement ... only" by lawmaking. Id. at 34. Accordingly, "Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked." Ibid. Not insignificantly, the Court at this point in its analysis twice observed that the Constitution did not give Congress power to repeal or amend laws by other than legislative means pursuant to Art. I. Id. at 33, n. 18.

To underscore the need for compliance with the requirements of bicameralism and presentment, the Court reviewed express constitutionally authorized departures from these requirements: House impeachments and Senate trials of the same, Senate advice and consent to presidential appointments and treaties negotiated by the President, and certain internal concerns of each House. The last mentioned unilateral authority, "[h]owever ... only empowers Congress to bind itself and is noteworthy only insofar as it further indicates the Framers' intent that Congress not act in any legally binding manner outside a closely circumscribed legislative arena, except in the specific and enumerated instances." Id. at 35, n. 20. The opinion concludes, saying: "To accomplish what has been attempted by one House of Congress in this case [i.e., reversal of administrative suspension of deportation] requires action in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President." Id. at 37.

Although the immediate effect of the Chadha decision is to invalidate the one-House legislative veto provision of the Immigration and Nationality Act at issue in the case, the Presentment Clause rationale cuts the ground out from under all legislative vetoes. Thus, while a concurrent or two-House resolution of approval or disapproval comports with bicameralism, it does not satisfy the requisite of presentation to the President for approval or veto. The broader implications of the Chadha reasoning were confirmed on July 6, 1983, when the Court summarily affirmed the District of Columbia Circuit Court of Appeals decision striking down the two-House veto contained in section 21 of the Federal Trade Commission Improvements Act of 1980, 15 U.S.C § 57(a)(1)(B), that Congress exercised to reject that agency's proposed used

car rule. United States Senate v. Federal Trade Commission, No. 82-935 (July 6, 1983).

The Court's June 23 decision and July 6 action establish that a one-House or a two-House veto of otherwise permitted executive or agency action is an act of legislative power. As such, they violate the Constitution which requires that legislative power may be exercised only as provided in Art. I, §§ 1 and 7, i.e., by joint action of the House and Senate and by presentment to the President. The four legislative provisions of the AECA would seem to fall within the proscription established by these cases.

It seems incontrovertible that in the exercise of its plenary power to regulate commerce, including the commerce in arms, and in establishing requirements applicable to foreign aid, including foreign military assistance, Congress can set reasonable conditions relating to such activities. Similarly, Congress can delegate to others, in the case of the AECA, the President, authority to administer the program in conformity with statutorily prescribed standards and conditions. Conceivably Congress could have regulated arms sales and transfers by firms and foreign purchasers without involving the President. The AECA, however, gives the President a significant role in such arms sales and transfers while at the same time reserving to Congress the power to cancel the same. The two-House veto in these circumstances operates to overrule an executive determination without subjecting its action to presidential approval or veto. As such, the veto in these circumstances has the purpose and effect of altering the legal rights, duties and relations of persons, both governmental and private, "all outside the legislative branch."

Absent the various veto provision of the AECA, neither one nor both Houses of Congress could negative an arms contract except by law.

After Chadha and progeny such a result "cannot be justified as an attempt" at amending or repealing the standards set out in the governing law. "Amendment and repeal of statutes, no less than enactment," the Court said, "must conform with Art. I." Id. at 33. In a lengthy footnote, the Court concluded that "Congress' authority to delegate portions of its power to administrative agencies provides no support for the argument that Congress can constitutionally control administration of the laws by way of a congressional veto." Id. at 32, n. 32.

The basis for the AECA, namely the power to regulate commerce and to condition expenditures for the general welfare, no more than the power to "establish an uniform Rule of Naturalization" which undergirded the veto denounced in Chadha, appear to authorize Congress to take action short of law that alters the legal rights, duties and relations of persons outside the legislative branch. Accordingly, the legislative veto provisions of the AECA are of dubious constitutionality.

The Severability Problem

A judicial determination that a statutory legislative veto provision is unconstitutional is not the end of the matter. Thereafter, the Court must determine whether the unconstitutional veto provision can be isolated or severed from the delegated authority to which it is annexed or whether the two are so inextricably intertwined that both must fall. The general rule established by earlier cases and reaffirmed by the Court in Chadha is "that the invalid portions of a statute are to be severed '"[u]nless it is evident that the

legislature would not have enacted those provisions which are within its power, independently of that which is not."'" Id. at 10, citing Buckley v. Valeo, 424 U.S. 1, 108 (1976), quoting Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 310, 234 (1932).

Resolution of the issue of severability involves consideration of three factors. The first factor to be considered is the presence or absence in the law of a severability clause; a provision whereby "Congress itself has provided the answer to the question of severability." INS v. Chadha, at 11. These clauses typically provide that judicial invalidation of any provision of an act, or its application to any person or circumstances, does not affect the remainder of that act or even the affected provision as it applies to other persons or in other circumstances. A severability clause creates a "presumption that Congress did not intend the validity of the Act as a whole, or of any part of the Act, to depend upon whether the [challenged provision] was invalid." Ibid.

Since a severability clause does not conclusively resolve the issue, the second factor that has to be considered is whether the presumption of severability it creates conforms to the intent of the lawmakers. This inquiry, termed "an elusive inquiry" by the Court, requires an examination of the legislative history of the provision for evidence that either supports or rebuts the presumption. Ibid.

The final factor to be considered is whether the provision less the severed part "survives as a workable administrative mechanism." Id. at 14. By implication, if the provision absent the veto is not functionally operable, the entire provision or act falls.

In summary, resolution of the severability issue in these cirsumstances depends upon a case-by-case review of the language of the act, its legislative history, and its ability to operate independent of the veto.

The Court in Chadha held the veto provision severable from the remainder of the section. This result was achieved by virtue of the broad severability clause in the Immigration and Nationality Act, § 406, 8 U.S.C. § 1101, and the Court's reading of the legislative history of the administrative deportation suspension provision. The presumption raised by the clause found support in the Court's finding that the legislative history evidenced congressional "irritation with the burden of private immigration bills" and an overriding desire to rid itself of that burden. Id. at 13.

The AECA and Severability

In applying these considerations to the AECA, it should be noted at the outset that the Act does not have a severability clause. At most, this omission means that that "elusive inquiry" into the intent of Congress does not benefit from a rebuttable presumption of severability. However, whether absence of the clause has that effect seems problematical given court doctrines regarding the presumption of constitutionality of congressional enactments and favoring a rule of constitutional law no broader than is required by the precise facts to which it is to be applied. See Powell J., concurring, INS v. Chadha, at 9.

Assuming that the absence of a severability clause imports neutrality, or a clean slate unencumbered by a presumption of any kind, the focus of attention turns to the legislative history of the AECA for any evidence of the intent of the lawmakers concerning severability.

The legislative history of this measure seems to justify the Court's characterization of examining legislative history for evidence of congressional intent as "embark[ing] on [an] elusive inquiry." This general observation is not meant to suggest that the circumstances surrounding the AECA's enactment and comments made during congressional deliberations on the legislation are devoid of evidence probative of the intent of the lawmakers. Indeed, the contrary in this instance is the case. There is a plethora of evidence, at least with regard to the four legislative vetoes applicable to sales, transfers and leases or loans of major weapons system and defense articles and services beyond a certain value authorized by sections 3, 36 and 63 of the Act, as amended, 22 U.S.C. §§ 2753, 2776, 2796b, that militates in favor of a conclusion of nonseverability. That is, the legislative history is replete with actions and statements that favor the conclusion that insofar as transactions in arms of the described kind are concerned, they would not have been authorized but for the accompanying congressional check in the form of a concurrent resolution of disapproval. Of particular significance and probative value in this regard is that Congress wrote the veto with respect to government sales of arms into the law notwithstanding that President Ford had vetoed an earlier version of the legislation because it contained a similar veto and other restrictive features which he found objectionable.

If this and other evidence which may be gleaned from the record of the legislation stood uncontradicted, it would be an easy matter to conclude that the delegated authority to make such sales subject to the veto, could not survive judicial invalidation of that veto. However, the record of the AECA is not so overwhelming one-sided but, as frequently is the case, contains

elements which if not contrary are at least inconsistent with that conclusion. As indicated, the congressional review procedures applicable to arms sales and transfers are subject to presidential waiver upon his certifying that an emergency exists that requires a proposed sale in the national security interests of the United States. Although the existence of this waiver authority in and of itself may not conclusively rebut implications flowing from congressional steadfastness in the face of an earlier presidential veto regarding a similar provision, it raises not insignificant, countervailing considerations.

In brief, notwithstanding seeming clear cut rules and criteria for determining severability, their application is far from a mechanical or a pro forma process. Resolution of this issue entails weighing invariably competing considerations concerning which reasonable persons may differ. In this connection, it is instructive to read the opinions of the Court and dissenting Justice Rehnquist in Chadha which, while purporting to examine the same legislative history, arrive at opposite conclusions on the basic question of severability.

The AECA, as amended, 22 U.S.C. § 2751 et seq. is the basic authority for cash and credit sales of defense articles and services to friendly countries (§§ 2762 and 2763). In addition to authorizing sales of military equipment for cash and on credit and from Department of Defense stocks (§ 2761), the Act establishes eligibility requirements for purchases by friendly countries (§ 2753), specifies the purposes for which military sales are authorized (§ 2754), and imposes various controls on their export (§ 2771 et seq.).

The Act imposes more than a score of arms sales-related reporting requirements on the President (§§ 2753(a), 2753(c), 2753(d), 2753(e), 2753(f), 2754, 2755, 2756, 2761(d), 2761(g), 2761(i), 2762(b), 2763, 2764(c), 2765, 2766, 2767(c), 2768, 2776, 2778(f), 2791(b), 2795b, 2796a) and annual monetary ceilings on foreign military sales credits (§ 2771). It declares the sense of the Congress that sales from stocks (§ 2761) and cash sales (§ 2762) and exports of weapons for police and specified internal enforcement purposes in any fiscal year should not exceed 1976 levels (§ 2751).

It is apparent on the face of the Act that the authority to furnish arms is cabined by numerous restrictions in addition to the four mentioned legislative veto provision that evidence congressional concern for the "dangers and burdens of armaments" (§ 2751). These features of current law are a far cry from its predecessor, the Foreign Military Sales Act of 1968, which was far less circumscribed and which from that date through 1974 did not contain a legislative veto. (See § 2751 note) In the latter year, Congress in the Foreign Assistance Act of 1974, 88 Stat. 1795, 1814 amended the Foreign Military Sales Act to add a two-House legislative veto applicable to government sales of defense articles or services for $25 million or more. Congress had twenty calendar days to consider the proposed sale but it allowed the President to waive congressional review by certifying that an emergency existed that had national security implications.

The substance of this provision, popularly termed the Nelson-Bingham amendment, is the predecessor of section 36(b) of the AECA, 22 U.S.C. § 2776(b). Senator Nelson, who had backed a similar proposal on at least two prior occasions, emphasized the significant implications for foreign policy of "huge" arms sales and that the latter were largely transacted

"without congressional and public debate, discussions or deliberations." 120 Cong. Rec. 38073 (Dec. 4, 1974). In further amplification of his remarks, the Wisconsin Senator said:

> "Clearly we are in need of a review process to keep up with the galloping growth of this program. Congress must have the necessary information on and oversight authority over proposed foreign military sales to exercise its responsibility in this crucial area. Legislation which the Senate has twice perceived a need for is even more crucial today.
>
> "Foreign military sales constitute major foreign policy decisions involving the United States in military activities without sufficient deliberation. This has gotten us into trouble in the past and could easily do so again.
>
> "Despite the serious policy issues raised by this tremendous increase in Government arms sales, these transactions are made with little regard for congressional or public opinion. The Department of Defense is consulted. The manufacturers of weapons and the providers of military services are consulted. The foreign purchasers are involved. But Congress is hardly informed of these transactions, much less consulted as to their propriety. As it stands now, the executive branch of the Government simply presents Congress and the public with the accomplished facts.
>
> "The lack of required reporting to Congress, coupled with the traditional secrecy surrounding international arms transactions, frequently results in Congress learning about arms sales only as

a result of the diligent efforts of the press. Thus, ironically, the American public learned of the 1973 sales to Persian Gulf countries only after the American media picked up an Agence France-Presse report and pressed the State Department spokesman to officially confirm the fact that we had an agreement in principle to sell Phantoms to Saudi Arabia and that we were negotiating a giant deal for arms to Kuwait.

"So, too, the American public learned about negotiations for the sale of jets to Brazil last year from a report originating in Brazil. And this summer the Washington Post correspondent in Quito, Ecuador — not Capitol Hill, Washington — reported U.S. intentions to resume military sales to Ecuador after a 3-year ban. Ecuador, which has been involved in the so-called tuna war with the United States, resulting in seizure of U.S. tuna boats and expulsion of U.S. military mission to Quito, reportedly had a long shopping list including 12 T-33 trainer jets, basic infantry equipment, and large quantities of engineering equipment.

"Congressional reliance on the press for hard data on U.S. Government arms sales abroad, however, is not the most serious deficiency in the decisionmaking system governing such sales. At this time there is no formal procedure by which Congress can participate in determining the merits of these arms deals before they are finalized. Nor is there any way for Congress to exert effective oversight authority and monitor the impact of these deals after they are negotiated." Id. at 38074.

"Mr. President, in closing, let me repeat my firm belief that this Government -- including both Congress and the executive branch -- have the responsibility to its own citizens and to the international community to give very careful consideration to weapons sales of such magnitude. This amendment would provide both the essential information and the necessary procedure for congressional review.

"Mr. President, all this amendment does, as I stated previously, is require the President to submit to both Houses of Congress for approval or disapproval under the Reorganization Act, sales of $25 million or more, or cumulative sales in 1 year to one country of $50 million or more. Therefore, Congress will have the opportunity to debate the wisdom of making the sale and its impact on foreign policy. It will have an opportunity to vote approval or disapproval.

"There is one additional provision. That is a provision that, in case of emergency such as the Middle East situation a year ago, the President does not need to submit the sale to Congress for its approval or disapproval, but he must report in writing to Congress why he is waiving the congressional veto requirement. He must delineate and explain the sale and what the emergency is." Id. at 38077.

A similar provision motivated by the same concerns was recommended by the House Foreign Affairs Committee in its version of the 1974 foreign aid bill. The report, in pertinent part, stated that "[t]he purpose of this

provision is to give the Congress more effective control over the amount of defense articles sold for cash each year. ... Present reporting procedures do not provide the Congress with all of the information needed to exercise effective oversight over foreign military cash sales. ... Foreign military sales are an important tool of U.S. foreign policy and in many cases have a direct impact upon our relations with both the purchasing country and on the neighboring countries as well. While enactment of this provision will not automatically trigger congressional action, it will give the Congress the opportunity to study the circumstances surrounding each major sale, and to assess the foreign policy impact of each such transaction." H. Rept. No. 93-1471 at 48-49.

The conference committee on the legislation generally accepted the House version with "an amendment to change the time that Congress had to disapprove the sale from 20 legislative days to 20 calendar days" and it was so enacted into law. H. Rept. 93-1610 at 49.

The issue of arms sales to foreign countries was the focus of extended congressional debate in 1976. Actually a move to bring the foreign military sales program under greater congressional controls began a year earlier, but proposals were still in committee when the 1st session of the 94th Congress was ended. The Ford Administration was opposed to the extension of such controls, controls which many in Congress felt necessary to prevent arms races and economic dislocation brought on by huge expenditures for arms.

In the spring of 1976, Congress passed a measure supplanting the Foreign Military Sales Act that contained numerous provisions which would have enabled it to control sales of major weapons systems and defense equipment by the government and by arms concerns. Although not the only means toward

that end, the legislative veto figured prominently in the control framework approved in the measure, S. 2662, which was sent to the President.

On May 7, 1976, President Ford vetoed the bill stating that it "would seriously obstruct the exercise of the President's constitutional responsibilities for the conduct of foreign affairs. In addition to raising fundamental constitutional problems, this bill includes a number of unwise restrictions that would seriously inhibit my ability to implement a coherent and consistent foreign policy." Although the bill had many features which he found objectionable (e.g., arms sale ceiling, human rights standards for aid, a suspension of the trade ban with Vietnam, and an end to military aid and military advisory groups), President Ford dealt at great length with its seven legislative veto provisions; provisions not only "incompatible with the express provisions of the Constitution" that require bicameral action and presidential approval, but that would make Congress "a virtual co-administrator" of foreign policy. 122 Cong. Rec. 13053-13055 (1976).

Neither the House nor the Senate attempted to override the veto but came up with new versions of the legislation. The report of the House Committee on International Relations that accompanied the revised legislation made some concessions but refused to "retreat from [the] basic reform initiatives" of the earlier measure. H.R. 13680; H. Rept. No. 94-1144 at 3. In particular, the committee recommended legislation that "retains two and deletes five" of the previously passed congressional vetoes. Ibid. One of those retained was a revised version of the 1974 Nelson-Bingham amendment to the Foreign Military Sales Act, applicable to government sales.

The Senate counterpart foreign aid bill would have allowed Congress to reject certain proposed export licenses for commercial sales as well as proposed government sales. The latter would have applied to all proposals totaling $25 million or more and all proposals to sell major defense equipment of $7 million or more. S. 3439; S. Rept. No. 94-876 at 4. In its report on the bill, the Senate Foreign Relations Committee expressed a "wish to avoid a prolonged confrontation over constitutional issues and on sharply different views over public policy." Id. at 12. However, the mentioned government and commercial sales vetoes were described as "provid[ing] a more coherent framework for the implementation of arms export policy by the Executive Branch ... [and] provid[ing] the Congress with procedures to review the implementation of the policy." Id. at 13. In summary,

> "Export arms sales are an increasingly important and sensitive aspect of our relations with other nations and of overall U.S. security policy. They cannot be regarded as the inviolate province of either the private sector or the Executive Branch. The time is long overdue for the Congress to devote more attention to arms sales. This bill will enable the Congress to exercise that responsibility in a manner which safeguards the legitimate interests of U.S. industry and coordinate prerogatives of the Executive and Legislative Branches of Government." Ibid.

As ironed out in conference and passed into law, the Congress by concurrent resolution could block a proposed government sale of major defense equipment for $7 million or more as well as an offer to sell defense articles or services for $25 million or more. The period for congressional

consideration of a disapproval resolution was enlarged from twenty to thirty calendar days. Also, the amount of information that the President had to supply to the Congress in connection with such proposed sales was significantly increased. Although notice of the commercial sale of similar items was required, the legislative veto applicable thereto by virtue of the Senate bill did not appear in the law. These changes were incorporated into sections 36(b) and (c) of the AECA, 22 U.S.C. § 2776(b) and (c), respectively.

Among the legislative vetoes omitted by Congress between the first and second "go rounds" on the AECA in 1976 was one that would have allowed for two-House disapproval of third-country transfers of U.S. origin arms. That provision which is set forth in section 3(d) of the Act, as amended, 22 U.S.C. § 2753(d), was added by section 18 of the International Security Assistance Act of 1977, 91 Stat. 614, 622. Enactment of the provision was urged by the House Committee on International Relations which described it as a means to "strengthen congressional oversight of transfers of U.S. defense equipment and services abroad by requiring a 30-calendar-day period for congressional review and possible disapproval of proposed third-country transfers prior to the granting of Presidential consent." H. Rept. No. 95-274 at 5. At another point in its report, the committee stated that its recommendations were an extension of the 1976 reforms and reflected "increasing concern over the rapid growth of U.S. arms exports around the world." Id. at 8. "Therefore the actions of the committee as reflected in this bill correspond closely to those taken last year, that is --- ... (4) Concern over third-country transfers requires congressional oversight of Executive approval of third-country transfer requests ...." Ibid.

In the International Security and Development Cooperation Act of 1980, 94 Stat. 3131, 3136 Congress enacted yet another legislative veto provision eliminated after President Ford's veto of the 1976 foreign aid bill. This provision, now contained in section 36(c) of the AECA, 22 U.S.C. § 2776(c), permits both Houses of Congress to disapprove a commercial sale of major defense equipment in the amount of $14 million or more and defense articles or services of $50 million or more. As such, this provision complements that in subsection (b) that applies to the sale of similar items by the government. The background of the 1980 extension to commercial sales indicates that it was the quid pro quo for the elimination of the $35 million dollar ceiling on sales of weapons made directly by American arms concerns. Thus, in summarizing the major provisions of the bill, the report of the Senate Committee on Foreign Relations states that the legislation "[r]emoves the $35 million ceiling on commercial arms exports and, makes corresponding changes such as adding a concurrent resolution veto for commercial arms exports," S. 2714; S. Rept. No. 96-732 at 2. In the sectional analysis part of the report, the committee made the following observation regarding the extension of congressional review to commercial sales:

> "Section 105 was introduced by Senator Glenn and modified by Senators Javits and Church.
>
> "Section 105(a) repeals the $35 million ceiling on commercial arms contained in section 38(b)(3) of the AECA.
>
> "Section 105(b)(1) modifies section 36(c) of the AECA to provide for a concurrent resolution veto during the 30-day Congressional review of a proposed license for exports authorized under section 38 of the AECA. This provision makes

> Congressional review of commercial sales comparable to its review of government-to-government sales. Congressional review during this 30-day period may be waived if the President states that an emergency exists which requires such export in the national security interests of the United States. ..." Id. at 23.

Interestingly, at the same time that Congress was subjecting large commercial sales to the legislative veto, it amended section 3(d) of the AECA, 22 U.S.C. § 2753(d), to extend its veto provision to retransfers of commercial exports as well as government sales. 94 Stat. 3131. In other words, "Congress will be able to veto the President's consent to any ... retransfer" of U.S. supplied arms to third countries whether the original transaction was a government sale or commercial export. S. Rept. No. 96-732 at 24.

The AECA's fourth veto provision, which applies to leases or loans of major defense equipment valued at $14 million or more and defense articles valued at $50 million or more, was enacted as part of the International Security and Development Cooperation Act of 1981. 95 Stat. 1519, 1524-1526. This provision, designated section 63 of the AECA, 22 U.S.C. § 2796b, was recommended to the Senate and House by their respective Foreign Relations and Foreign Affair Committees. The former generally described the proposed new sections of the Act as "[p]rovid[ing] increased congressional control and new regulations for defense articles leasing authority." S. Rept. No. 97-83 at 2. Elsewhere, the committee gave the following account of the background and effect of the proposed new leasing regulations:

> "Earlier this year the Committee received a report by the General Accounting Office on the use of section 2667 of title

10, United States Code. The GAO found that although section 2667 of title 10 was intended to provide authority for the leasing of defense property to domestic corporations and state and local governments, it has been used increasingly and inappropriately to provide military assistance to foreign countries. The GAO concluded that the practice of leasing equipment on a rent-free or nominal rent basis was tantamount to grant military assistance and as such was circumvention of the Arms Export Control Act and the Foreign Assistance Act. It also discovered the absence of control over property leased to foreign governments.

"Section 110, introduced by Senator Zorinsky, creates a new Chapter 6 in the Arms Export Control Act. It establishes authority in the Arms Export Control Act for the lease of defense articles to foreign countries and international organizations and brings all such leases under the various provisions of the Arms Export Control Act and the Foreign Assistance Act.

"It requires that the rent charged on leases to foreign governments and international organizations cover the full cost incurred by the United States in leasing the articles, which would establish rent at a rate no less than the annual amortization of the replacement value of the property computed over the useful life of the property. The requirement would not apply to leases entered into for purposes of research and development, military exercises, communications or electronics interface projects and leases of defense articles past three-quarters of their normal service lives.

"Section 110 also requires prior notification to the Congress of all leases to foreign countries and international organizations entered into for a period of one year or longer and provides for a concurrent resolution of disapproval of leases exceeding the thresholds recommends (sic) by the Administration of $14 million for major defense articles and $50 for all defense articles. It is the intent of the Committee that the Executive Branch not enter into leases of defense property for less than one-year periods specifically to avoid reporting under the requirements of the amendment. It is also the intent of the Committee that the Executive Branch consult with the Congress prior to entering into any lease which could be considered controversial or which could be considered politically or militarily significant in terms of its impact on a nation or a region of the world.

"The Committee understands that the Defense Security Assistance Agency has recently issued new guidance in the Military Assistance and Sales Manual for the valuation of leased property and expects that this guidance will enable the Administration to establish a realistic value for property leased to foreign countries and international organizations.

"The Committee further expects that the President shall establish management control and accountability procedures over leased property. These procedures shall require the monitoring of lessee compliance with the terms in lease agreements as well as the assurance that all lease payments are made when due." Id. at 30-31. See, also, H. Rept. No. 97-58 at 2325.

The 1981 Act also raised the threshold amounts to which earlier congressional review procedures applied to $14 million or more of major defense equipment (up from $7 million) and $50 million or more of defense articles and services (up from $25 million). 95 Stat. 1519.

Summary

As indicated at the outset of consideration of the severability issue in the context of the AECA, and as seemingly borne out by the foregoing, relevant highlights from the Act's legislative history, evidence abounds that insofar as sales, transfers and leases or loans of major defense equipment and significant amounts of defense articles are concerned, the authority delegated to engage in these transactions was largely dependent upon Congress' ability to cancel them. In brief, the case for nonseverability, that is, judicial invalidation of the veto carries with it the authority to engage in the sale, transfer and lease or loan of major articles of military hardware, appears to be a strong one. Initially in 1968 and for six years thereafter under the Foreign Military Sales Act, that authority was largely unrestricted. Beginning in 1974, Congress began taking a long and hard look at the impact of huge arms sales on foreign policy and its own inability to leave an imprint on that policy. In that year Congress added a veto provision to the earlier law applicable to certain government sales of arms.

In 1976, past congressional concern with the apparent global proliferation of arms races and the U.S. role as the world's major supplier of military hardware, took a quantum leap. Although efforts in 1976 to remedy the problem in one fell swoop were stymied by a presidential veto, Congress since that time has not only substantially revised the basic authority but has realized its

once thwarted goals in piecemeal but unrelenting fashion. On the eve of the Chadha decision, Congress had garnered all it had originally sought and then some by way of legislative controls on significant arms transactions.

The drive to exercise its policy origination function in this crucial area was powered by three factors: congressional concern for the impact of U.S. arms sales on peace and economic stability in foreign countries, doubts about Executive Branch policies in discharging congressional delegated arms sales authority, and an unmistakable desire to obtain information indispensable to the effective conduct of oversight and the adoption of relevant, remedial legislation. The legislative veto was seized as providing the chief if not the only fool proof mechanism to discharge its responsibilities. Although it did not directly "provide[] the answer to the question of severability in" the relevant sections of the AECA, both the product of its actions and the manner in which it acted, suggest an answer, namely, that if forced to choose between delegating authority or legislative veto, it would have decided for neither. The absence in the AECA of a severability clause, whereby "Congress itself [could have] provided the answer to the question of severability", may just reflect such a decision.

While this record is instinct with results imperfectly expressed, there are a number of countervailing considerations. Notwithstanding congressional apprehension with arms races and U.S. contributions thereto, the lawmakers have always recognized the need to keep friendly countries sufficiently supplied with arms to defend themselves and to maintain internal stability so that they could develop viable democratic institutions and strong economies. Thus, AECA policy declarations in-

veigh against "the scourge of war and the dangers and burdens of armaments" but "recognize[], however, that the United States and other free and independent countries continue to have valid requirements for effective and mutually beneficial defense relationships in order to maintain and foster the environment of international peace and security essential to social, economic, and political progress." (§ 2751) Accordingly, the AECA "authorizes sales ... to friendly countries ... to maintain and equip their own military forces at adequate strength, or to assume progressively larger shares of the costs thereof, ... in furtherance of the security objectives of the United States ...." Ibid. Or, as expressed in more recent times by the Senate Foreign Relations Committee: "Security assistance provides friendly foreign countries with the means to defend themselves and hopefully reduces the temptation for neighbors or outside powers to threaten those countries." S. Rept. 97-83 at 9.

Also, while Congress in recent years has for various reasons extended its control over arms sales, it is not without some instructive value that in earlier years it delegated the authority to engage such sales without such controls. Briefly, the enactment of controls in this area fits the overall pattern of imposing similar controls in all areas of statutorily delegated authority. Moreover, in recent years Congress has frequently reviewed arms sales authority and left it otherwise untouched notwithstanding increasing doubts concerning the constitutionality of veto provisions within and without the legislative arena.

Similarly, notwithstanding the extension of the veto in the last half dozen years to first one and then another kind of arms transaction, Congress

in the four AECA vetoes has authorized the President to waive review procedures and, thus, effectively circumvent the veto. The maintenance of the waiver by Congress in the face of disagreements with the Executive Branch over particularly sensitive sales may indicate that in the crunch Congress regards the authority to strengthen friendly countries to be the overriding consideration.

The AECA imposes numerous restrictions on the availability, use, and disposition of arms acquired from U.S. sources of supply. These restrictions obviously apply and can only apply to U.S. origin items. However, the U.S. is not the sole source supplier of even major defense equipment much less run of the mill defense articles and services. Accordingly, if the authority to deal in arms falls with the veto, purchasers may be able to obtain the equivalent materials from non U.S. sources unencumbered by restrictions regarding use and retransfer. This fact, while arguably outside the immediate legislative history of the sections of the AECA under consideration, could have been determinative had Congress considered the matter in this light. The Court in United States v. Jackson, 390 U.S. 570 (1968), faced with the question of whether an invalid death penalty provision was severable from the federal Kidnapping Act, noted the continued basic operability of the Act without the stricken provision and the fact that kidnapping would have been made a federal crime, given the political circumstances at the time, even without the death penalty. In such circumstances, the Court stated that it "is quite inconceivable that the Congress which decided to authorize capital punishment in aggravated kidnapping cases would have chosen to discard the entire statute if informed that it could

not include the death penalty clause now before us." 390 U.S. at 586. In like manner, one may ask whether Congress would have refused to delegate authority to the President to furnish arms abroad without the veto if potential purchasers could obtain these items from sources which do not restrict their use and disposal.

Finally, it should be noted that the four provisions in the AECA under consideration are "'fully operative' and [constitute a] workable administrative machinery without the veto provision[s]." INS v. Chadha, at 13. Formulating the narrowest rule of constitutionality, as the courts are doctrinally inclined to do, the veto could be severed without impairing requirements concerning the notice of impending sale, transfer and lease or loan and the thirty calendar day layover period before it becomes effective. During that period, Congress by appropriate legislative action could prevent the export.

Insofar as resolution of the severability issue in the context of the AECA is concerned, persuasive arguments for and against are not lacking. The absence of a severability clause and legislative history seem to incline in one direction; the existence of presidential waiver authority and practical considerations seem to cut in the other direction. As clearly evidenced by the differing views taken in the matter in Chadha, the determination is essentially a judgment call based on emphasis and nuance.

Epiloque

Although it is difficult to conceive of a litigation scenario whereby this important issue might be judicially resolved, particularly if Chadha and progeny make an exercise of the veto unlikely, such resolution from the congressional perspective is tantamount to a roll of the dice. Congress can

considerably enhance its chances and, indeed, achieve a foreordained result by the adoption of an appropriate law. For example, Congress can provide for approval or disapproval of particular arms transactions by joint resolution. The latter follows all the formalities of law. A joint resolution of approval increases the congressional workload but avoids the need to muster two-thirds to override a presidential veto. Conversely, a joint resolution of disapproval reduces the workload by reducing the frequency of need for lawmaking; it, however, affords greater opportunity for the exercise of the Executive's veto. These matters aside, the constitutionality of either approach seems clear.

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APPENDIX 9

EFFECT OF THE LEGISLATIVE VETO DECISION ON THE TWO-HOUSE DISAPPROVAL MECHANISM TO TERMINATE A PRESIDENTIAL DECLARATION OF NATIONAL EMERGENCY

The decision of the Supreme Court in INS v. Chadha holding a one-House legislative veto unconstitutional and subsequent High Court action affirming a lower court ruling in United States Senate v. Federal Trade Commission invalidating a two-House veto provision have widespread implications for foreign as well as domestic policy. Nowhere was the desire to get a handle on administration of the law -- both to implement congressional policy and to curb potential abuse -- more apparent than in the overlapping, sensitive fields of foreign affairs and national security. The device increasingly relied upon in recent years to carry out these twin congressional purposes has been one- and two-House resolutions of approval or disapproval of proposed Executive Branch action impacting on foreign affairs. In an appendix to his dissent in Chadha, Justice White listed some fifty-six legislative veto provisions potentially affected by the Court's decision. Conspicuously, the first sixteen fall into this category and include such high priority subjects as war powers, arms transfers and sales, national emergency authorities, and nuclear nonproliferation.

This report will discuss the impact of these recent Supreme Court actions on the two-House legislative veto contained in the National Emergencies Act that enables Congress to end a presidentially declared national emergency and the exercise of statutory grants of extraordinary power available to the Executive in emergency circumstances.

Assessing the constitutional status of the veto in this important context is but the beginning of a two part inquiry. An ancillary but by no means subsidiary inquiry is the ripple effect of a finding of unconstitutionality of the veto itself on the act or the part of that act that incorporates

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it. This latter issue, termed the severability problem, has assumed critical significance given the fact that the underpinnings of Chadha and progeny are largely negative insofar as the status of the veto itself is concerned.

The National Emergencies Act

In the early 1970s, thanks largely to the work of the Senate Special Committee on the Termination of the National Emergency and its successor, the Special Committee on National Emergencies and Delegated Emergency Powers, Americans became aware that they were living under four states of emergency: President Roosevelt's 1933 banking emergency, President Truman's 1950 Korean War emergency, and President Nixon's 1970 post office emergency and 1971 balance of payments crisis. The National Emergencies Act, Source Book: Legislative History, Texts, and Other Documents. (Committee Print). Senate Committee on Government Operations and the Senate Special Committee on National Emergencies and Delegated Emergency Powers, 94th Cong., 2d Sess. (1976) at 1-3 (hereinafter Committee Print). Any of these emergency declarations could be used by the President in conjunction with various statutory authorities "to seize property and commodities, organize and control the means of production, call to active duty 2.5 million reservists, assign military forces abroad, seize and control all means of transportation and communication, restrict travel, and institute martial law, and, in many other ways, manage every aspect of the lives of all American citizens." Committee Print at 20. The fact that these and other powers contained in 470 emergency statutes could be instantaneously utilized under the authority of four legally outstanding but unrelated emergencies fueled the drive to bring some order and regularity to the area. The National Emergencies Act was adopted to remedy this situation. '[T]he statute is an effort by the Congress to establish clear

procedures for the exercise by the President of emergencies conferred upon him by other statutes." Committee Print at 292. Its purpose was:

> " ... to terminate, as of 2 years from the date of enactment, powers and authorities possessed by the Executive as a result of existing states of national emergency, and to establish authority for the declaration of future emergencies in a manner which will clearly define the powers of the President and provide for regular congressional review." Committee Print at 291.

In order to carry out this purpose, the National Emergencies Act made a number of significant changes in the then current legal situation and imposed a procedural overlay on the invocation and exercise of emergency authorities. Initially, it terminated as of September 14, 1978 -- two years after enactment -- powers and authorities available to the President in literally hundreds of statutes, as a result of the four states of national emergency then outstanding. § 101, 90 Stat. 1255 (1976). 50 U.S.C. § 1601. This action had the effect of clearing the legal decks by neutralizing the consequences of the extant national emergencies. It meant that the statutory authorities thereafter could be exercised only in the context of a legitimate, relevant emergency. In other words, future Presidents could not rely on an unrescinded and unrelated state of emergency to exercise emergency powers as, for example, President Johnson's 1968 reliance on President Truman's 1950 Korean War emergency in conjunction with section 5(b) of the Trading with the Enemy Act (TWEA), 12 U.S.C. § 951, 50 U.S.C. App. § 5(b), to impose foreign investment controls. Committee Print at 156-157. The two-year delay between enactment and effectiveness was "designed to provide time for all executive agencies, offices, and departments dependent on emergency statutes for their day-to-day operations, to seek permanent legislation, if appropriate. It ... permit[ted] an orderly transition and [gave] the Congress adequate opportunity to evaluate executive requests." Committee Print at 292.

Next, the Act calls for regular congressional review of future declarations of national emergencies and subjects them to congressional termination at any time by concurrent resolution. Recognizing and reconfirming the availability of congressional statutory delegations of authority to the President whenever he declares a national emergency, the Act conditions their lawful exercise on compliance with its requirements. § 201; 50 U.S.C. § 1621. Initially and 'immediately", the proclamation of a national emergency must be transmitted to the Congress and published in the Federal Register. Ibid. A state of national emergency proclamined by the President may be terminated by him or by the Congress by concurrent resolution. § 202(a); 50 U.S.C. § 1622(a). Provision also is made for automatic termination on the anniversary of the proclamation if the President does not renew it in a timely fashion and complies with the previously mentioned congressional submission and publication requirements. § 202(d); 50 U.S.C. § 1622(d). Within six months of a presidential declaration of national emergency and every six months thereafter, each House of Congress has to "meet to consider a vote on a concurrent resolution to determine whether ... [it] shall be terminated.' § 202(b); 50 U.S.C. § 1622(b). Provision is made for accelerated handling of a concurrent resolution thus assuring timely congressional review and prompt congressional action. § 202(c); 50 U.S.C. § 1622(c).

In addition to congressional review, the Act makes the President prospectively and retrospectively accountable for actions taken in the exercise of delegated emergency powers. Either in conjunction or fairly contemporaneous with a proclamation declaring a national emergency, the President has to specify the emergency authorities he or his delegates will use. § 301; 50 U.S.C. § 1631. "This ... procedure permits the Executive to invoke only

the emergency provision he needs without bringing into force an entire body of law, and insures that the Congress and the public will know what statutes are brought into force." Committee Print at 294. The President is further required to maintain a file and index of all significant orders that he issues and the agencies likewise are to maintain a file of all rules and regulations that they issue during the emergency. § 401(a); 50 U.S.C. § 1641(a). These orders, rules and regulations have to be sent to the Congress. § 401(b); 50 U.S.C. § 1641(b). At regular intervals during an emergency and within 90 days after its termination, the President has to report on total expenditures connected with his exercise of emergency authorities. § 401(c); 50 U.S.C. § 1641(c).

Not insignificantly, particularly for severability analysis, the Act repealed or amended a number of emergency authorities that were found to be superseded or obsolete. § 501; 50 U.S.C. § 1601 note. It also exempted, and thus kept in force certain emergency laws deemed essential to on-going programs (e.g., control on domestic Cuban assets pursuant to section 5 (b) of the TWEA). The Act, however, directed committees of the House and Senate to review and evaluate these laws and report their recommendations regarding retention, revision or repeal within 270 days of its enactment. § 502; U.S.C. § 1651.

The National Emergencies Act like the War Powers Resolution, 87 Stat. 555 (1973); 50 U.S.C. § 1541 et seq., before it marked another attempt by Congress in the post Vietnam-Watergate era to reassert its policymaking prerogatives and involve the legislature in activities that have a direct bearing on foreign relations and national security. It was also intended to end the "disarray" that to many observers characterized "the whole field of emergency statutes and procedures". S. Rept. No. 466, 95th Cong., 1 Sess.

at 9. As with the War Powers Resolution on which it was largely "patterned", the National Emergencies Act superimposed on the exercise of critical authorities a procedural framework that would provide an opportunity for congressional review and oversight and accountability for actions taken by the President. Committee Print at 294. By and large, these procedural requirements, particularly those specifying the manner in which an emergency is to be declared and emergency authorities exercised and the process by which the President is to keep Congress fully informed of developments both during and after an emergency has been declared, present non-controversial matters. Similarly, the provision for automatic termination of an emergency on its anniversary date unless the President extends it, seems to be a "durational limit [] on authorizations" which the Court in the principal legislative veto decision indicated is "well within Congress' constitutional power." This, however, is not the case with respect to the mechanism in section 202 of the Act, 50 U.S.C. § 1622, that allows Congress to terminate a state of emergency 'at any time by concurrent resolution.' Committee Print at 291. The underpinnings of that provision have been shaken, if not profoundly compromised, by judicial developments of the summer of 1983.

The Legislative Veto After Chadha And Progeny

The Court in INS v. Chadha, No. 80-1832 (June 23, 1983), invalidated the one-House veto of administrative action suspending deportation on hardship grounds under section 244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1254(c)(2). The rationale for the decision is grounded in the bicameralism and presentment requirements of Article I, section 1, and Article I, section 7, clauses 2 and 3 of the Constitution. These provisions specify, respectively, that "all legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate

and a House of Representatives" and that "Every Bill" as well as "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary" shall be presented to the President for an opportunity to approve or disapprove, the latter subject to override by two-thirds of both Houses of Congress. Slip op. at 25. (Emphasis in original). These "[e]xplicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process." Id. at 24-25. As described by the Court, "the prescription for legislative action in Art I, §§ 1 and 7 represents the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure." Id. at 31. Whether actions taken by either House are the type of "legislative action" subject to the bicameralism and presentment requirements of Art. I "depends not on their form but upon whether they contain matter which is properly to be regarded as legislative in its character and effect." Ibid. Insofar as the one-House veto of the Attorney General's decision to suspend Chadha's deportation was concerned, the Court said that "[i]n purporting to exercise power defined in Art. I. § 8, cl. 4 to 'establish an uniform Rule of Naturalization,' the House took action that had the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the legislative branch." Id. at 32.

In the Court's view, the act of reversing the Attorney General's decision to suspend deportation, like the grant of the authority to make that decision, "involve[d] determinations of policy that Congress can implement ... only" by lawmaking. Id. at 34. Accordingly, "Congress must abide by its

delegation of authority until that delegation is legislatively altered or revoked." Ibid. Not insignificantly, the Court at this point in its analysis twice observed that the Constitution did not give Congress power to repeal or amend laws by other than legislative means pursuant to Art. I. Id. at 33, n. 18.

To underscore the need for compliance with the requirements of bicameralism and presentment, the Court reviewed express constitutionally authorized departures from these requirements. House impeachments and Senate trials of impeachments, Senate advice and consent to presidential appointments and treaties negotiated by the President, and certain internal concerns of each House. The last mentioned unilateral authority, "[h]owever ... only empowers Congress to bind itself and is noteworthy only insofar as it further indicates the Framers' intent that Congress not act in any legally binding manner outside a closely circumscribed legislative arena, except in the specific and enumerated instances." Id. at 35, n. 20. The opinion concludes, saying: "To accomplish what has been attempted by one House of Congress in this case [i.e., reversal of administrative suspension of deportation] requires action in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President." Id. at 37.

Although the immediate effect of the Chadha decision is to invalidate the one-House legislative veto provision of the Immigration and Nationality Act at issue in the case, the Presentment Clause rationale cuts the ground out from under all legislative vetoes. Thus, while a concurrent or two-House resolution of approval or disapproval comports with bicameralism, it does not satisfy the requisite of presentation to the President for approval or veto. The broader implications of the Chadha reasoning were confirmed on July 6,

1983, when the Court summarily affirmed the District of Columbia Circuit Court of Appeals decision striking down the two-House veto contained in section 21 of the Federal Trade Commission Improvements Act of 1980, 15 U.S.C § 57(a)(1)(B), that Congress exercised to reject that agency's proposed used car rule. United States Senate v. Federal Trade Commission, No. 82-935 (July 6, 1983).

The Court's June 23 decision and July 6 action establish that a one-House or a two-House veto of otherwise permitted executive or agency action is an act of legislative power. As such, they violate the Constitution which requires that legislative power may be exercised only as provided in Art. I, §§ 1 and 7, i.e., by joint action of the House and Senate and by presentment to the President. The provision of the National Emergencies Act that permits Congress to end a declared state of national emergency seems to fall within the proscription established by these cases.

The theory behind the legislative veto is that it operates as a check on congressional delegations of portions of legislative power. In the overwhelming number of cases in which it operates, the same law delegates authority and subjects its exercise to congressional approval or disapproval in the form of simple one-House or two-House concurrent resolutions. For constitutional analytical purposes it should not make any difference in terms of results that the delegated authority and the veto device, as in the case of the National Emergencies Act's conjunction with statutory emergency authorities, are in distinct laws. The latter clearly delegate to the President powers and authorities to cope with extraordinary circumstances upon his declaring a national emergency. The two-House veto authorized by the National Emergencies Act to end a national emergency operates to overrule an executive determination and executive exercise of authorities without

his approval or veto. As such, the legislative veto in these circumstances has the purpose and effect of altering the legal rights, duties and relations of persons, both governmental and private, "all outside the legislative branch."

Absent the veto provision of the National Emergencies Act, neither one nor both Houses of Congress could reverse a presidential determination that an emergency existed and cancel associated executive exercise of delegated authority except by law.

After Chadha such a result "cannot be justified as an attempt" at amending or repealing the standards set out in the governing law. "Amendment and repeal of statutes, no less than enactment," the Court said, "must conform with Art. I." Id. at 33. In a lengthy footnote, the Court concluded that "Congress' authority to delegate portions of its power to administrative agencies provides no support for the argument that Congress can constitutionally control administration of the laws by way of a congressional veto." Id. at 32, n. 16.

The bases of constitutional power for these statutory delegations -- involving various of the enumerated congressional powers -- no more than the power to "establish an uniform Rule of Naturalization" which undergirded the veto denounced in Chadha, appear to authorize Congress to take action short of law that alters the legal rights, duties and relations of persons outside the legislative branch. Accordingly, the legislative veto provision of the National Emergencies Act is of doubtful constitutionality.

The Severability Problem

A judicial determination that a statutory legislative veto provision is unconstitutional is not the end of the matter. Thereafter, the Court must determine whether the unconstitutional veto provision can be isolated

or severed from the delegated authority or other matter to which it is annexed or whether the two are so inextricably intertwined that both must fall. The general rule established by earlier cases and reaffirmed by the Court in Chadha is "that the invalid portions of a statute are to be severed '"[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not."'" Id. at 10, citing Buckley v. Valeo, 424 U.S. 1, 108 (1976), quoting Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 310, 234 (1932).

Resolution of the issue of severability involves consideration of three factors. The first factor to be considered is the presence or absence in the law of a severability clause; a provision whereby "Congress itself has provided the answer to the question of severability." INS v. Chadha, at 11. These clauses typically provide that judicial invalidation of any provision of an act, or its application to any person or circumstance, does not affect the remainder of that act or even the affected provision as it applies to other persons or in other circumstances. A severability clause creates a "presumption that Congress did not intend the validity of the Act as a whole, or of any part of the Act, to depend upon whether the [challenged provision] was invalid." Ibid.

Since a severability clause does not conclusively resolve the issue, the second factor that has to be considered is whether the presumption of severability it creates conforms to the intent of the lawmakers. This inquiry, termed "an elusive inquiry" by the Court, requires an examination of the legislative history of the provision for evidence that either supports or rebuts the presumption. Ibid.

The final factor to be considered is whether the provision less the severed part "survives as a workable administrative mechanism." Id. at 14.

By implication, if the provision absent the veto is not functionally operable, the entire provision or act falls.

In summary, resolution of the severability issue in these circumstances depends upon a case-by-case review of the language of the act, its legislative history, and its ability to operate independent of the veto.

The Court in Chadha held the veto provision severable from the remainder of the section. This result was achieved by virtue of the broad severability clause in section 406 of the Immigration and Nationality Act, 8 U.S.C. § 1101, and the Court's reading of the legislative history of the administrative deportation suspension provision. The presumption raised by the clause found support in the Court's finding that the legislative history evidenced congressional "irritation with the burden of private immigration bills" and an overriding desire to rid itself of that burden. Id. at 13.

The National Emergencies Act and Severability

Notwithstanding the absence of a severability clause in the National Emergencies Act, the invalidation of its veto does not import the usual thorny problem of ascertaining whether the authority to which it is annexed is similarly, adversely affected. Fundamentally, as previously indicated, the Act does not delegate any authority to the President but imposes a procedure on delegations made in other legal sources. 'The Committee decided that the definition of when a President is authorized to declare a national emergency should be left to the various statutes which give him extraordinary powers. The National Emergencies Act is not intended to enlarge or add to Executive power. Rather the statute is an effort by the Congress to establish clear procedures and safeguards for the exercise by the President of emergency powers conferred upon him by other statutes." Committee Print at 292.

In addition to the implications flowing from the procedural as distinguished from the substantive character of the Act, the legislative record associated with its framing and passage are barren of any indication that deprived of the veto, Congress would have wanted to profoundly alter the whole field of emergency delegations. Indeed, the evidence points in the other direction.

In contrast to the War Powers Resolution, which for other purposes was its model, the National Emergencies Act was not motivated by an overwhelming desire to deter unilateral presidential action in emergency situations. Instead, it was intended to clear the air of a not inconsiderable amount of legal - historical baggage because of four unrescinded states of emergency and to regularize the practice in this vital area of the law. "The purpose of [the Act] is to terminate, as of 2 years from date of enactment, powers and authorities possessed by the Executive as a result of existing states of national emergency, and to establish authority for the declaration of future emergencies in a manner which will clearly define the powers of the President and provide for regular congressional review." Committee Print at 291.

In actions large and small Congress signaled its acceptance of the need for standby emergency authorities which empower the President to act in extraordinary and unperceived circumstances. For this reason, "the Committee [made] no attempt to define when a declaration of national emergency is proper." Committee Print at 292. Further evidence in this regard is supplied by section 201(a) of the Act, 50 U.S.C. § 1621(a), which recognizes and reconfirms the availability of special powers for use by the President in a national emergency. "With respect, to acts of Congress authorizing the exercise, during the period of a national emergency, of any special or extraordinary power, the President is authorized to declare such national emergency."

Further evidence of the legislative veto's independence of delegated powers and authorities is supplied by sections 501 and 502 of the Act, 50 U.S.C. § 1601 note, 1651. These two sections "[r]epeal[ed] specific obsolete emergency power statutes and retain[ed] in force certain statutes deemed necessary for ongoing operations of the government." Committee Print at 291. The express provision of repeals with respect to these select, specific statutory delegations, according to a well known standard of statutory construction, impliedly rejects the notion that any other repeals or abrogation of other authorities was intended.

Insofar as the final severability criteria is concerned, it seems clear that the National Emergencies Act is "'fully operative' and [constitutes a] workable administrative machinery without the veto provision." INS v. Chadha, at 13. That is, even without the veto, the provisions of the Act specifying the procedures for declaring a national emergency and exercising emergency authorities, ongoing and final reports to Congress, and the automatic termination of a state of emergency on its anniversary date are fully operable.

Summary

Despite differences between the laws containing legislative vetoes that were overturned by recent Supreme Court actions and the National Emergencies Act — the latter operates on delegations of authority extrinsic to it — Chadha and progeny have adverse implications for its veto provision. The exercise of the veto to terminate a declared state of national emergency has the purpose and effect of altering rights, duties and relations of persons outside the legislative branch. The Act's veto, therefore, is consitutionally suspect since congressional action reversing the President "involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President." Id. at 34.

Also, despite the absence of a severability clause, both the internal structure of the Act and its legislative history suggest that the concurrent resolution provision can be severed without ill effect on other parts of the National Emergencies Act.

Epilogue

As a practical matter congressional options for remedying the National Emergencies Act in light of the Surpeme Court's legislative veto jurispurdence seem fairly limited. Clearly, Congress appreciated the need for standby authorities of sufficient breadth and flexibility to cope with future contingencies only dimly perceived in advance After investigation and study into the possibility of defining "when a President is authorized to declare a national emergency', the Senate Select Committee concluded that determination "should be left to [the President in] the various statutes which give him extraordinary powers." Committee Print at 292. At least one of the major reasons for discarding a definitional approach may have been that it would have sacrificed the obvious need for flexibility when the nation is confronted with a crisis situation. The attempt to cast the standby authorities contained in 400 or more statutes in more precise or specific terms likewise runs the risk of compromising their utility for service in future crisis circumstances. In retrospect, Congress, for example, can take comfort in having rejected certain proposals to delete authority altogether and coming up with a non war substitute for the TWEA in the form of the International Emergency Economic Powers Act, [IEEPA], 91 Stat. 1626 (1977); 50 U.S.C. § 1701 et seq., which enabled President Carter to take action in retaliation for the occupation of the U.S. embassy and the seizure of Americans in Iran

Assuming that Congress continues to be of the view that emergency authority has to be broad to be effective, it can substitute a joint resolution for the concurrent resolution in the National Emergencies Act. Although the use of a joint resolution opens the door for a presidential veto, it is questionable whether a President would wish to continue a national emergency without congressional and public support.

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